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No. OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ATTORNEY R, Petitioner

v.

THE MISSISSIPPI BAR, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSISSIPPI

PETITION FOR WRIT OF CERTIORARI

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April 26, 1995

QUESTIONS PRESENTED

1. Are Rules 7.1(a&b), 7.2(a&f), and 7.4(a&b) of the **Mississippi Rules of Professional Conduct** violative of the freedom of speech afforded Attorney R by the First Amendment of the Constitution of the United States of America when applied to sanctions of an attorney when the only proof is that an attorney failed to include in his advertisements of his practice of law a disclaimer mandated by said Rules, there being no demonstrative proof of falsity, deceptiveness, misleading, or other activity impinging on any public activity or on any interest of the clients?

2. Do Rules 7.1(a&b), 7.2(a&f), and 7.4(a&b) of the **Mississippi Rules of Professional Conduct** create an irrebuttable presumption and thus violate Attorney

R's rights to due process of law as afforded him by the Fifth and Fourteenth Amendments of the Constitution of the United States of America when applied to sanctions of an attorney when the only proof is that an attorney failed to include in his advertisements of his practice of law a disclaimer mandated by said Rules, there being no demonstrative proof of falsity, deceptiveness, misleading, or other activity impinging on any public activity or on any interest of the clients?

[**Note:** Petitioner reserves the right to argue Question 3 in the event certiorari is granted on either of the above questions but does not include Question 3 among the reasons for the grant of certiorari.]

3. Has Section 7 of the **Mississippi Rules of Professional Conduct** been so unenforced by The Mississippi Bar that the enforcement against Attorney R denied him the equal protection of the laws afforded him by the Fourteenth Amendment of the Constitution of the United States of America when applied to sanctioning him for an advertisement that was no different in a deficiency of the required disclaimer than numerous other attorneys' ads for previous and subsequent years to the original Complaint filed and none of the other attorneys had been so sanctioned?

LIST OF PARTIES AND RULE 29.4(C) LIST

The parties to the proceedings below were the petitioner, Attorney R, and the respondent, The Mississippi Bar, formerly known as The Mississippi State Bar, an arm of the judiciary of the State of Mississippi.

There is drawn into question in this proceeding the constitutionality of the referenced statutes of the State of Mississippi, and 28 U.S.C. §2403(b) may be applicable. Rule 29.4(c) of the Rules of this Court requires and petitioner in his **Proof of Service** filed herein serves this pleading upon Mike Moore, Attorney General of the State of Mississippi.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

ATTORNEY R, Petitioner

v.

THE MISSISSIPPI BAR, Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF MISSISSIPPI

The petitioner Attorney R respectfully prays that a writ of certiorari issue to review the **Judgment** and opinion of the Supreme Court of the State of Mississippi entered in the above-entitled proceeding on January 26, 1995.

OPINIONS BELOW

The final **Judgment** of the Supreme Court of Mississippi, which appears in the

appendix hereto, p. 1a, **infra.**, is reported at 649 So. 2d 820 (Miss.1995).

The **Opinion and Judgment** of the Complaint Tribunal of the Supreme Court of Mississippi, dated April 5, 1993, is not reported. It is reprinted in the appendix hereto, p. 21a, **infra.**

JURISDICTION

As grounds upon which this Court has jurisdiction, Attorney R would show that the final **Judgment** of the Supreme Court of Mississippi, dated January 26, 1995, and sanctioning him with a private reprimand and costs, held that Rules 7.1(a&b), 7.2(a&f), and 7.4(a&b) of the **Mississippi Rules of Professional Conduct** as applied in this case, are not unconstitutional as being violative of Petitioner's rights of free speech guaranteed by the First Amendment of the Constitution of the United

States of America nor of the Due Process Clause of the Fifth and Fourteenth Amendments of the Constitution of the United States of America. The jurisdiction to review the judgment of the highest state court is invoked under 28 U.S.C. §2101(c) and is submitted for consideration pursuant to Rule 10.1(c) of this Court where the lower court decided a federal law question in a way that conflicts with applicable decisions of this Court.

CONSTITUTIONAL PROVISIONS AND RULES

First Amendment, **The Constitution of the United States of America:**

"Congress shall make no law . . . abridging the freedom of speech . . . ."

Fifth Amendment, **The Constitution of the United States of America:**

"No person shall . . . be deprived of life, liberty, or property, without due

process of law . . . ."

Fourteenth Amendment, **The Constitution of the United States of America:**

"[N]or shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Mississippi Rules of Professional Responsibility:

Rule 7.1, Communications Concerning A Lawyer's Services.

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's services. A communication is false, deceptive or misleading if it: (a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the state-

ment as a whole not materially misleading; (b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law.

Rule 7.2, Advertising.

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public communication. (f) If a public communication, other than an approved law list or law directory, refers to an area(s) of law in which a lawyer performs or wishes to perform professional services, except those areas specifically governed by Rule 7.4(b), the public communication must include immediately after the listing the following statement:

"Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein." The disclaimer shall not be in a type size smaller than the largest size of type used to list the ares of practice.

Rule 7.4, Communication Of Fields Of Practice.

(a) A lawyer may communicate the fact that the lawyer does . . . practice in particular fields of law. In public communication of practice in particular fields of law, a lawyer must include the statement required by Rule 7.2(f).
(b) A lawyer shall not state or imply that the lawyer is a specialist except as follows: . . . ." in patent or admiralty practice.

(The Constitutional Amendments and the Rules of Professional Responsibility are set out verbatim in the appendix hereto, beginning at p. 29a and 31a, respectively.)

STATEMENT OF THE CASE

The petitioner, Attorney R, was admitted to the practice of law in 1979. At all times material herein he resided in Warren County, Mississippi, while maintaining law offices in Vicksburg and Jackson, Mississippi.

In 1989, Attorney R advertised his law practice in The Real Yellow Pages in the fields of auto accidents, faulty products, medical negligence, workers' compensation and bankruptcy. The advertisements did not include the Rule 7.2(f) disclaimer. p. 34a-35a.

Attorney R was one of 38 attorneys to whom Michael Martz, General Counsel for the Mississippi State Bar ["the Bar"], wrote March 26, 1990, demanding that their advertisements include the Rule 7.2(f) disclaimer and to provide proof of compliance "to mitigate any possible disciplinary action that may be initiated against" them. Attorney R replied that he had not violated any "constitutionally valid rules of professional conduct". Attorney R thereafter neither included nor agreed to include in his advertisements the disclaimer.

On May 31, 1990, Mr. Martz filed a **Complaint** (Docket #89-436-2) with said Bar. The **Complaint** alleged that Attorney R had advertised in The Real Yellow Pages for the year 1989-1990 and because the disclaimer was not included therein such advertisement was misleading, false and deceptive and such failure was in viola-

tion of Rule 7.1(a) and 7.4(a&b) of the **Mississippi Rules of Professional Conduct.** In the **Complaint**, he verified that "No person can testify about what was said, done, not done or agreed upon by you and the attorney."

At the earliest stage of the disciplinary proceedings below, petitioner raised the constitutional claim.

On June 14, 1990, Attorney R in his response to the **Complaint** filed with the Bar affirmatively charged that the requirements of Rules 7.2(f) and 7.4(a) of the **Mississippi Rules Of Professional Conduct** ["the **Rules**"] "violate federal and state constitutional protections of freedom of speech, equal protection and due process of law."

Although the purpose of the **Complaint** was to grant investigative authority to the Bar, there was no evidentiary hearing on the **Complaint.**

On July 27, 1990, Mr. Martz, at the direction of the Committee on Professional Responsibility, filed a **Formal Complaint** in the Supreme Court of Mississippi, before a Complaint Tribunal ["the Tribunal"] in case #90B784. The Bar filed an **Amended Complaint** on August 21, 1990, the substance of which was the same as that as the May 31, 1990 **Complaint** except Attorney R's advertisement in the 1990-1991, edition of The Real Yellow Pages was included.

On October 24, 1990, Attorney R answered denying the advertisement contained a false, deceptive, and misleading communication about his legal services, denying any obligation to use the disclaimer and affirmatively stating that the requirement of the disclaimer violated his First Amendment right of freedom of speech afforded him by the Constitution of the United States of America.

Attorney R served upon the Bar interrogatories the intent of which was to draw out the facts to be proved that any person had been deceived or mislead by his advertisements and the manner and method for which the advertisements were false. On November 21, 1990, the overall response to the interrogatories was a conclusion by the Bar that since the advertisements did not include the disclaimer they were false, deceptive and misleading. No person was identified as having been harmed by said advertisement.

On May 13, 1992, without any activity on the case since November 21, 1990, the Bar filed a **Motion For Summary Judgment.**

On June 22, 1992, Attorney R filed a **Motion To Dismiss**, a ground of which included that there was no sworn testimony in support of the motion in proof of facts concerning the falsity, deceptiveness or

misleadingness of Attorney R's public communication but for the failure to include the disclaimer. He also claimed a denial of procedural due process resulting therefrom.

On October 22, 1992, before the Tribunal on the Bar's **Motion**, counsel for the Bar stated Attorney R's defense as being the constitutionality of the disclaimer Rule. Attorney R urged that the issue was quite an important matter of freedom of speech, cited verbatim from this Court's decision in **In re: R.M.J.**, 455 U.S. 191, 205 (1981) wherein it found the listings published by the appellant had not been shown to be misleading and the portion of disciplinary rule in that case an invalid restriction upon speech as applied to appellant's advertisements.

The only testimony was by Mr. Martz, who admitted that the Bar had no written inquiry concerning Attorney R's advertise-

ment; but rather it had comments from attorneys and the Bar makes a sweep of an area when it has an inquiry. He confessed the Bar never received any complaint from any individual that such individual was either deceived, mislead or provided false information from Attorney R's advertisement. There was no empirical data offered in support that any harm would occur without the use of the disclaimer in attorney advertising nor that the disclaimer would alleviate the perceived harm.

The Tribunal granted the Bar's Motion stating there to be no factual dispute with respect to the advertisements and the advertisements, as made and published, were violative of the provisions of Rule 7.2(f). Attorney R's motion to dismiss was denied. The Tribunal further opined that though it was not drawing any inferences, the Supreme Court of Mississippi could in certain matters and areas

draw inferences as logical consequences from acts or conduct or facts and that the Mississippi Supreme Court adopted and promulgated Rule 7.2(f) to avoid the possible misleading or misconception of those who read the advertisements or receive the advertisements and to remove the advertisement from its condemned effect upon the public a disclaimer is necessary.

On April 5, 1993, the Tribunal's **Opinion and Judgment** was filed with the Supreme Court of Mississippi.

On May 3, 1993, Attorney R appealed the Tribunal's decision to the Supreme Court of Mississippi, which reviewed the matter de novo.

The First, Fifth and Fourteenth Amendment claims were raised on appeal by Attorney R before the Supreme Court of Mississippi. They were detailed in his **Appeal Brief** in the Statement of Issues, in the Listing Of Areas Of Practice Pres-

ents No Danger Of Deception, in the Other Constitutional Issues, and in the Conclusion.

That court, **En Banc**, found that Attorney R had violated **Rules** 7.1(a), 7.2(f) and 7.4(a) because the mere listing of areas of practice without the disclaimer amounts to a per se false, deceptive and misleading advertisement over which the Bar has a substantial interest on behalf of the state to regulate. p. 9a-14a.

The Supreme Court of Mississippi, after having reviewed the constitutional issues raised, found "[c]onsequently, Attorney R's argument that his constitutional rights have been violated are unfounded." p. 15a, **infra.**

The court did not directly address the failure of the Bar to present any demonstrative evidence that the evils over which it claimed to have a substantial interest in protecting the public did in

facts exist and how the inclusion of the disclaimer would cure those evils. By its per se approach in holding the **Rules** to not being violative of Attorney R's freedom of speech rights afforded by the Constitution of the United States of America, the Supreme Court of Mississippi implicitly found demonstrative evidence to not be a pre-requisite to governmental regulation of commercial speech.

This **Petition** is directly from the state court decision.

REASONS FOR GRANTING THE WRIT

I.

The Supreme Court of Mississippi's per se doctrine in applying lawyer disciplinary rules without a requirement of demonstrating a need therefor and of harm resulting therefrom is an impermissible restraint on truthful commercial speech and conflicts with decisions of this Court relating to that First Amendment safeguard.

The Mississippi Supreme Court has decided an important question of federal law in a way that conflicts with applicable decisions of this Court. Such conflict "is a strong reason for the granting of certiorari". **Hudson v. Louisiana**, 450 U.S. 40, 42 (1981).

The matters for consideration before the lower state court were violations of First Amendment freedom of speech, Fifth

and Fourteenth Amendment due process and Fourteenth Amendment equal protection relating to the Bar restrictions upon Attorney R's print media advertisement. The statutory jurisdictional ground is 28 U.S.C. §2101(c).

The Bar argued supposition to the court about dangers of attorneys publishing that they practice in named fields of law but failed to validate its contentions by studies, anecdotal evidence or Attorney R's own conduct.

The Supreme Court of Mississippi in a more restrictive manner and means than permissible by the decisions of this Court in **Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio**, 471 U. S. 626, 648-649 (1985); **In re: R.M.J.**, 455 U.S. 191, 203 (1981); **Ohralik vs Ohio State Bar Association**, 436 U.S. 447, 462 (1977); and **Bates v. State Bar of Arizona**, 433 U.S. 350, 377-378 (1977) granted The

Mississippi Bar, an arm of the state judiciary, authority to regulate and sanction attorneys advertising in that state for a mere failure to include in their advertisements a disclaimer, which on its face is equally as likely to create confusion among the consuming public between the terms "ability", "competence", "limited fields of law" and "specialty". The decision in **The Mississippi Bar v. Attorney R**, 649 So.2d 820 (Miss.1995), if not overturned by this Court, will have a far-reaching erosion of and negative impact on commercial speech in the State of Mississippi, not only upon attorneys but upon other professions regulated by the state.

The granting of certiorari to the Supreme Court of Mississippi on the First Amendment issue would serve to correct the law of the State of Mississippi which "threatens societal interests in broad access to complete and accurate commercial

information that the First Amendment coverage of commercial speech is designed to safeguard." **Edenfield v. Fane**, 507 U.S. ???, ??? (1993).

The Supreme Court of Mississippi has surrendered its citizens' commercial speech protections afforded by the First Amendment to the unsupported suppositions of The Mississippi Bar that without the disclaimer the public will be deceived, misled, and subject to false information about an attorney's abilities. The lower court in its discussion of the law acknowledged that lawyer advertising may be regulated when "a particular form or method of advertising has proved to be deceptive in the past . . . ." **Attorney R, Id.** at 823, citing **McLellan v. Mississippi State Bar**, 413 So.2d 705, 708 (Miss.1982).

The two optimum groups of words of the **McLellan** decision are "proved to be deceptive" (past tense - actual deception)

and "in the past" (neither prospective nor possibility). In fact, that court made the **Bates'** advertisement part of the **McLellan** opinion at page 709, thereby inferring such advertisement to be in acceptable form and content for lawyer advertisement. The Supreme Court of Mississippi further found in its pre-**Rules** decisions, **McLellan**, at 707, that the issue of commercial speech by an attorney was more fully resolved in the well written opinion in **Re: R.M.J., Id.** and recognized that

> [i]t is established constitutional law that prior restraints on speech are not tolerated absent the clear and present danger. [citation omitted] Prior restraints on expression bear a heavy presumption against their legality. The party seeking restraint bears the heaviest

burden of justification. [citation omitted].

Thornton vs Breland, 441 So.2d 1348, 1350 (Miss.1983).

The **Mississippi Rules of Professional Conduct**, which became effective July 1, 1987, were a response to **McLellan** by non-advertising attorneys who in numbers greatly exceed the advertising attorneys. The response was to restrict truthful advertisement, if not totally eliminate it, "through unduly burdensome disclosure requirements [that] offend the First Amendment" contrary to this Court's decisions in **Ibanez v. Florida Department Of Business And Professional Regulation, Board Of Accountancy**, ??? U.S. ???, ??? (1994) and **Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio**, 471 U.S. 626, 651 (1985).

Rule 7 and its subparts were the device to stop or inhibit truthful advertisement. Until Attorney R's response to the March 26, 1990 letter of Mr. Martz, there had been no challenge to the Rule, only submission.

The decision in the case at bar being the first to address the constitutional issues implicitly reverses that court's prior decisions to placate The Mississippi Bar, creates new violative standards upon commercial speech of attorneys advertising in the state, and directly conflicts with the well established decisions of this Court concerning freedom of speech as it relates to commercial speech which is not false, deceptive or misleading.

The issue of this exact disclaimer concerning an attorney's advertisement was before this Court in **In re: R.M.J.**, Id. at 195n.6 but at oral argument appellant's counsel announced to the Court that be-

cause the action had not been based upon a failure to include the disclaimer, the constitutionality thereof was not before the Court. Id. at 204n.18.

In **Ibanez**, Id. at ??? (slip op., at 11), the matter of a disclaimer for a certified public account, who also was an attorney, was before this Court. The Court expressed no opinion whether in other proved circumstances "a disclaimer might serve as an appropriately tailored check against deception or confusion." **Id.**

Now squarely before this Court is the issue of the disclaimer required by a rule of professional responsibility declaring an advertisement to be false, deceptive and misleading if the advertisement did not include the required disclaimer. According to the lower court the rule is not violative of First Amendment freedom of speech protections and the

enforcement agency is not required to prove actual harm.

This Court has found that actual deception, not the possibility of deception, must occur for a state to invoke its substantial interest to regulate commercial speech. "[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree." **Edenfield**, **Id.** at ???. (slip op., at 5). See, e.g., **Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio**, 471 U.S. 626, 648-649 (1985); **Bolger v. Youngs Drug Products Corp.**, 463 U.S. 60, 71n.20 (1983); **In re: R.M.J.**, 255 U.S. 191, 205-206 (1981); **Central Hudson Gas & Electric Corp. v. Public Service Comm'n of New York**, 477 U.S. 557, 569 (1980); **Friedman v. Rogers**, 440 U.S. 1, 13-15 (1979); and **Linmark Associates, Inc.**

v. Willingboro, 431 U.S. 85, 95 (1977).

The Supreme Court of Mississippi has expanded the regulatory power beyond its decision in **Attorney R** by adopting new and more restrictive rules upon lawyer advertising. The new **Rules** are similar to those in the **Florida Bar v. Amendments To Rules Regulating the Florida Bar**, 621 So.2d 1032 (Fla.1993).

II.

When a state demonstrates that ithas a substantial interest in a actual harm resulting from commercial speech, it may not use irrebuttable presumption means or methods to deny Attorney R the protections afforded him by the due process clauses of the Fifth and Fourteenth Amendments where such means or methods have the effect of creating an absolute ban on the advertisement in violation of the Freedom of Speech Clause of the First Amendment.

Contrary to this Court's ruling in **Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio,** 471 U.S. 626, 648-649 (1985) the Supreme Court of Mississippi rotely invoked the the words "inherently misleading" to support the ban on Attorney R's advertisement which did not have the disclaimer. That court found that the failure to use the disclaimer to be "inherently misleading" in that

> [t]he public could easily assume that an attorney who lists areas(s) of practice in an advertisement is either a specialist or more competent in the particular area(s) listed than attorneys who do not advertise those particular area(s) or who advertise the area(s), but use the disclaimer. The disclaimer is to prevent misleading statements to the public and to prevent a disservice to all attorneys who comply

with the rule.

Attorney R, at pp. 823-824.

The Supreme Court of Mississippi overlooks that this Court in **In re R.M.J.**, 455 U.S. 191, 203 (1982) said that the words in the advertisement must be inherently misleading it did not rule that the failure to use words in the advertisement was inherently misleading. Even though Rule 7.1(a) states that there may not be an omission in the communication which would make the communication as a whole misleading, the Rule is that it be **materially** misleading.

This Court in **Cleveland Board of Education vs LaFleur**, 141 U.S. 632, 645 (1974), citing **Vlandis vs Kline**, 412 U.S. 441, (1973) reaffirmed permanent irrebuttable presumptions to have been long disfavored under the protections afforded by the Due Process Clause of the Fifth and Fourteenth Amendments, and that

the Due Process Clause requires a more individualized determination. "When a statute sweeps too broadly to presumptively include within its presumptions 'not necessarily or universally true in fact' and there are 'reasonable alternative means of making the critical determination', the statute violates the Due process Clause of the Fifth Amendment." **Cleveland**, at page 644-645.

The irrebuttable presumption upon which this **Petition** is based is the false syllogism used by the Bar and adopted by the Supreme Court of Mississippi reviewing its per se approach.

Major premises

False, deceptive or misleading public communications include a failure to include the disclaimer.

Minor premises

False, deceptive or misleading public communications contain **material** misrepresen-

tations of facts or omit facts necessary to make the communication considered as a whole not materially misleading.

Conclusion

The failure to include the disclaimer in public communications is a material misrepresentation of facts or omits facts necessary to make the communication considered as a whole not materially misleading.

The state court adopted irrebuttable presumption approach is as follows:

The Rules require the disclaimer. An attorney impliedly represents himself to the public as having special expertise in the field of law advertised when the disclaimer is not included therein. An attorney may not represent himself as having special expertise in a particular field unless it is patent or admiralty law. An attorney who impliedly represents himself as an expert in the unnamed fields

of practice has made a false, deceptive and misleading communication about himself or his services. Rule 7.1(a)

However, Rule 7.1(a) requires that the communication be "a **material** misrepresentation of **fact or law** or [to] omit[] a fact necessary to make the statement as a whole no **materially** misleading" [petitoner's emphasis].

Materiality is a factual issue. The proof of materially as a factual issue is lost in connecting the major and minor premises toward a conclusion. The court below creates its own definition of how a communication is false, deceptive or misleading but failed to state how the lack of including the disclaimer was material so as to make the advertisement false. The **Judgment** of the Supreme Court of Mississippi in that respect exceeds safeguards afforded petitioner by the due process clause of the Fifth and Fourteenth

Amendments of the Constitution of the United States of America.

The **Judgment** was rendered sustaining the Bar's **Motion For Summary Judgment** ["**Motion**"] upon the fact that the court assumed the public could be misled or have a misconception, **Attorney R**, at p. 823-824, not proof that it had been misled or had a misconception, about the disseminated information. Nevertheless, there was an equal question of fact of whether the consuming public may be misled or have a misconception about the disseminated information by Mr. Robb. It was the obligation of the movant The Mississippi Bar to prove material facts in support of its **Motion** rather than proffer an assumption of what may or may not happen to others or what others believe or may not believe.

The Supreme Court of Mississippi exercised and applied an unconstitutional per se approach to the motion and sup-

planted the burden of proof of material facts with the court's presumptions, which are irrebuttable. There being no proof of actual misleading, misrepresentation or falseness about the advertisement for Attorney R to offer rebuttable evidence, the **Motion** was sustained in violation of petitioner's due process rights afforded by the Fifth and Fourteenth Amendments of the Constitution of the United States of America.

The ruling by the lower court effectively absolutely bans lawyer's truthful commercial speech about the lawyers' fields of practice without the inclusion of the disclaimer which is required to be in a type size no smaller than the largest size of type used to list the ares of practice. Rule 7.2(f). **Ibanez v. Florida Department Of Business And Professional Regulation, Board Of Accountancy**, No.93-

639 (U.S.Sup.Ct., decided June 13, 1994), (slip op., at 11).

Such ban violates the freedom of speech guaranteed to truthful commercial speech by the First Amendment of the Constitution of the United States of America. **Ibanez, supra.** at ___ (slip op., at 8); and **Edenfield v. Fane**, 507 U.S. ___, ___ (slip op., at 9).

Also, the **Judgment** impermissibly grants protection to one commercial group from truthful commercial speech of a competing commercial group. The court stated the disclaimer is to prevent a disservice to all attorneys who comply with the rule. **Attorney R**, at p.824.

CONCLUSION

For the above reasons, this petition for certiorari should be granted.

Petitioner reiterates that **Question**

3 is presented herein, not as a ground for granting certiorari, but because in the event that this case is remanded for fact finding in support of the The Mississippi Bar's motion, petitioner would raise in the disciplinary proceedings the question of whether the unequal enforcement of the **Rules** in the facts concerning Attorney R violated his equal protection rights afforded him by the Fourteenth Amendment of the of the United States Constitution.

Respectfully submitted,

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APPENDIX

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Appendix

State Court

Opinions, Findings of Fact,

and Conclusions of Law

IN THE SUPREME COURT OF MISSISSIPPI

NO. 93-BA-00442

(decided January 26, 1995)

THE MISSISSIPPI BAR

V.

ATTORNEY R

EN BANC.

MCRAE, JUSTICE FOR THE COURT:

INTRODUCTION

A formal complaint was filed by the Mississippi Bar charging Attorney R with violating Rule 7.1(a), 7.2(f) and 7.4(a) & (b) of the Mississippi Rules of Professional Conduct which deals primarily with lawyer advertising and the failure to print the required disclaimer. The com-

plaint also charged Attorney R with violating Miss. Code Ann. §73-3-35 (1972) which is an oath that an attorney makes pledging that he will practice in good fidelity.

A hearing was held in front of the Complaint Tribunal whereupon the Bar's motion for summary judgment was granted and Attorney R's motion to dismiss was denied. An Opinion and Judgment was rendered by the Tribunal which found Attorney R guilty of violating all three rules and the statute. Attorney R was commanded to pay for the costs of the proceeding and given a private reprimand. Thereafter, Attorney R timely perfected this appeal. He raised the following issues on appeal:

I.

The omission of the disclaimer was not false, deceptive or misleading per se. [p.1]

II.

The rules, if found to be an irrebuttable presumption that it is a per se violation not to include a disclaimer, violates the Fifth and Fourteenth Amendment Due Process Clauses of the United States Constitution.

III.

If the Court does not find merit with the first issue, then the rules violate the attorney's First Amendment right of free speech.

IV.

The rules have been unenforced in the past, and therefore, warrant no discipline in this instance.

V.

The discipline does not satisfy the purpose of the rules.

The Bar counterclaimed on appeal for more severe discipline for the violations of which the Complaint Tribunal found him

guilty. Finding that the Complaint Tribunal appropriately analyzed and applied our Rules of Professional Conduct, we affirm Attorney R's punishment of a private reprimand and costs of the proceeding and deny the Bar's counterclaim for more severe discipline.

STATEMENT OF FACTS

Attorney R is a resident of Jackson, Mississippi and was a member of the Mississippi Bar at the time of his alleged violations of the Mississippi Rules of Professional Conduct. Attorney R advertised his legal services in The Real Yellow Pages of South Central Bell's Greater Jackson Telephone Book for the 1989-90 and 1990-91 editions.

The advertisements listed Attorney R as practicing in the following particular fields of law: auto accidents, faulty

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products, medical negligence, worker's

compensation and bankruptcy. This listing did not include the requisite statement that Mississippi does not certify expertise in particular fields of law. The crux of this case is the omission by Attorney R of the following disclaimer in his advertisements: **"Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein." Mississippi Rules of Professional Conduct Rule 7.2(f)(emphasis added).** Before the Complaint Tribunal, Attorney R denied that the failure to include the statement was, as a matter of law, misleading, false or deceptive communication, but he did not deny that his advertisements omitted the language required by the rule. The Complaint Tribunal found such blatant disregard for the rules to necessitate punishment and issued a private reprimand in its Opinion and Judgment dated April 5, 1993.

DISCUSSION OF LAW

The Rules of Professional Conduct which Attorney R was charged with violating are summarized as follows:

1. Rule 7.1(a) which provides that a lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's services.

2. Rule 7.2(f) which provides that if a public communication, other than an approved law list or law directory, refers to areas of law in which a lawyer performs or wishes to perform professional services, except those areas specifically governed by Rule 7.4(b), it must include immediately after the listing the

[p.3]

following statement: **"Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein."** Any public communication through a written medium

shall contain such statement in type no smaller than the largest size print used to list the areas of practice. (emphasis added).

3. Rules 7.4(a)&(b) provides that a lawyer may communicate the fact that the lawyer does or does not participate in particular fields of law; however the lawyer must include the statement required by Rule 7.2(f). **A lawyer may not state or imply that he is a specialist** except where he is designated a "Patent Attorney" or a substantially similar designation by the United States Patent and Trademark Office or where he is engaged in admiralty practice.

Attorney R was also charged with violating a statute which compromises an oath for attorneys to make to each court. The pertinent portion of which follows:

[w]ill demean myself, as an attorney and counselor of this court, according to

the best of my learning and ability, and with all good fidelity as well to the court as to the client; that I will use no falsehood nor delay any person's cause for lucre or malice, and that I will support the constitution of the State of Mississippi so long as I continue a citizen thereof.

Miss. Code Ann. §73-3-35 (Revised 1989).

This Court has addressed attorney advertising in the Yellow Pages when attorneys' conduct of this State was governed by the Code of Professional Responsibility. **McLellan v. Mississippi State Bar**, 413 So.2d 705 (Miss.1982). **McLellan** held that "the Bar may regulate advertising and impose discipline where the record

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indicates that a particular form or method of advertising has proved to be deceptive in the past..." **Id.** at 708.

The standard of proof for the Complaint Tribunal is clear and convincing evidence. **Attorney Q. v. Mississippi State Bar**, 587 So.2d 228, 231 (Miss.1991). This burden of proof is on the Bar to show in disciplinary proceedings that the attorney violated the rule(s) in question. **Terrell v. State Bar**, 635 So.2d 1377, 1384 (Miss.1994); **Attorney W. L. v. Mississippi Bar**, 621 So.2d 235, 237 (Miss.1993). While bar disciplinary proceedings are quasi-criminal in nature, "the beyond-a-reasonable doubt standard does not apply; rather, we require an intermediate level of certainty regarding the facts at issue, to-wit; a clear and convincing evidence standard." **Id.** at 232 (citing **Mississippi State Bar v. Odom**, 566 So.2d 712, 714 (Miss.1990); **Mississippi State Bar v. Nichols**, 562 So.2d 1285, 1287 (Miss. 1990); **Levi v. Mississippi State Bar**, 436 So.2d 781, 783 (Miss.1983); and

Netterville v.Mississippi State Bar, 397 So.2d 878, 884 (Miss.1991).

Attorney R asserted that his omission was not proven to be false or misleading to the public. He said that it may or may not mislead the public, and a possibility does not rise to the higher standard of clear and convincing evidence. The Rules of Professional Conduct are interpreted "from the perspective of the reasonable client or, in this instance, the reasonable lay person with whom the lawyer is charge with misleading." **Attorney Q. v.Mississippi Bar**, 587 So.2d 228, 231 (Miss.1991). The United States Supreme Court has specifically mentioned that listings of

[p.5]

areas of practice have the potential to mislead the public. **See In re R.M.J.**, 102 S.Ct. 929 (1982). Attorney R offered to the Complaint Tribunal a convoluted

argument about truthfulness claiming that there is nothing untruthful about the listings that he practices law in the areas mentioned in the ads. He further argued that there was no factual finding that he could not represent the public in these areas. This technically totally misses the boat. The Bar is not arguing that Attorney R is incapable of practicing law in these areas; the argument is that he cannot hold himself out as an expert which he impliedly does to the public when he lists his areas of practice. Attorney R countered this argument by claiming Rule 7.2(f) is in conflict with Rule 1.1 which he claimed requires expertise if he performs work in particular areas. Rule 1.1 does not require expertise, but rather, competency.

The Bar does not limit what an attorney can include in an advertisement unless information contained in the advertisement

is misleading, deceptive, or false. The idea is to ensure that lay people are not misled by the listing of areas of practice in the absence of certification of specialties in Mississippi. Attorney R claimed that the listings do not suggest any greater degree of professional qualification; the Bar believed to the contrary. Certainly, the implication of exceptional capabilities can arise. The public could easily assume that an attorney who lists areas(s) of practice in an advertisement is either a specialist or more competent in the particular area(s) listed than attorneys who do not

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advertise those particular area(s) or who advertise the area(s), but use the disclaimer. The disclaimer is to prevent misleading statements to the public and to prevent a disservice to all attorneys who comply with the rule.

Attorney R's second and third issues on appeal allege constitutional violations. The United States Supreme Court has addressed the issue of attorney advertising within the context of constitutional rights. **See, Peel v. Attorney Registration and Disciplinary Commission of Illinois**, 110 S.Ct. 2281 (1990); **Shapero v. Kentucky Bar**, 486 U.S. 464 (1988); and **In re R.M.J.** 455 U.S. 191 (1982). The Mississippi Rules of Professional Conduct are in line with the United States Supreme Court's mandate in **In re R.M.J.** which set forth that a state may prohibit misleading advertising entirely, but it may not place an absolute prohibition on potentially misleading information if the information could also be presented in a way that is not deceptive. **Id.** at 937 (specifically mentioning listing of areas of practice as being potentially misleading, not per se misleading).

Mississippi does not prohibit a lawyer like Attorney R from exercising his First Amendment rights of free speech, but the state has an interest in protecting the public, and hence, can regulate any potentially misleading communication as reasonably necessary. Attorney R's Fifth Amendment argument that regulations are not to be unreasonable, arbitrary or capricious in order to satisfy due process requirements is without merit.

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This Court has recognized that listing of areas of practice by attorneys has the potential to mislead the public, therefore the Bar's argument that it has a substantial interest on behalf of the state to regulate attorneys' conduct in this area is accepted. "[W]hen the particular content or method of the advertising suggests that it is inherently misleading or when the experience has

proved that in fact such advertising is subject to abuse, the States may impose appropriate restrictions." **In re R.M.J.**, 102 S.Ct. at 937. Consequently, Attorney R's argument that his constitutional rights have been violated are unfounded.

This Court conducts **de novo** review in a bar disciplinary matter which necessarily includes a review of the sanctions imposed. **Hoffman v. Mississippi State Bar**, 508 So.2d 1120, 1124 (Miss. 1987); **Myers v. Mississippi State Bar**, 480 So.2d 1080, 1089 (Miss.1985).

> [D]eference is accorded the findings of the Complaint Tribunal but this Court has the non-delegable duty of ultimately satisfying itself as to the facts, and reaching such conclusions and making such judgements as it considers appropriate and just.

Mississippi State Bar v. Varnado, 557

So.2d 558, 559 (Miss.1990).

On appeal, the Bar sought discipline greater than a private reprimand. "The most important consideration in imposing sanctions is that the punishment be sufficient to 'vindicate in the eyes of the public the overall reputation of the bar.'" **Mississippi Bar v. Hall**, 612 So.2d 1075 (Miss.1992) (citing **Mississippi State Bar Ass'n v. A Mississippi Attorney**, 489 So.2d 1081, 1084 (Miss.1986). Attorney R complained that the punishment he received

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should not be warranted because, according to him, the rules prior to this time were not enforced, and furthermore, the discipline did not satisfy the purpose of the rules. The Bar denied selective prosecution of advertising violations amongst attorneys claiming it sent out 20-38 different notices during the 1989-90 and 1990-91 time periods, and all of the at-

torneys except Attorney R chose to bring their ads in compliance with the rules. The Bar had no formal written complaint against Attorney R's or any other attorney's action, but rather, reviewed the yellow pages advertisements in several cities in response to "letters of inquiry" and comments from other lawyers.

In cases involving attorney misconduct, this Court has set forth several factors for determining the appropriate discipline for attorney misconduct. **Mississippi Bar v. Attorney ST**, 621 So.2d 229, 233 (Miss.1993); Hall, 631 So.2d 120, 125 (Miss.1993) and **Hall**, 612 So.2d at 1077 (citing **Mississippi State Bar v. Blackmon**, 600 So.2d at 166, 173 (Miss.1992); **Mississippi Bar v. Strauss**, 601 So.2d 840, 844 (Miss.1992); **Attorney Q v. Mississippi State Bar**, 587 So.2d 228, 234 (Miss.1991); and **Fougerousse V. Mississippi State Bar Ass'n**, 563 So.2d 1363,

1366 (Miss.1990). The factors are: (1) the nature of the misconduct involved; (2) the need to deter similar misconduct; (3) the preservation of the dignity and reputation of the profession; (4) the protection of the public; and (5) the sanctions imposed in similar cases. **Id.**

Nothing can be more clear and convincing than the actual

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photocopies of the advertisements as they appeared in the telephone book evidencing Attorney R's omission of the statement. Perhaps no other activities, aside from an attorney's actions themselves, communicate more about the profession than advertisements. It is imperative that the profession be regulated in this area to avoid an already diminishing view of the judicial system by the American public. Given the magnitude of this subject and Attorney R's obvious disregard for the

rules, sanctions were appropriately imposed in this case.

CONCLUSION

There is clear and convincing evidence of the existence of violations by Attorney R of Rules 7.1(a), 7.2(f), and 7.4(a) & (b). In addition, there is clear and convincing evidence based on the transcript that Attorney R knew he was violating the Rules by not including the disclaimer in his advertisements. While the statute's language sweeps over the conduct required for Attorney R, there is more than sufficient evidence based on the exhibits to issue a private reprimand to him for his omissions pursuant to the Rules.

As there were no material facts that were truly disputed, the Mississippi Bar was rightly entitled to a judgement as a matter of law. Finally, considering the nature of Attorney R's violations of the

Rules, the imposition of a private reprimand was quite generous of the Tribunal and more than appropriate. Accordingly, the Bar's

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request that Attorney R's discipline be more extensive is denied, and the holding of the Complaint Tribunal is affirmed. JUDGEMENT IS AFFIRMED.

HAWKINS, C.J., LEE AND PRATHER, P.JJ., SULLIVAN, PITTMAN, BANKS, ROBERTS AND SMITH, JJ. CONCUR.

Complaints Tribunal

Opinions, Findings of Fact,

and Conclusions of Law

IN THE SUPREME COURT OF MISSISSIPPI

(BEFORE A COMPLAINT TRIBUNAL)

THE MISSISSIPPI BAR COMPLAINANT

VS CAUSE NO. 90-B-784

R. CHARLES ROBB, III RESPONDENT

BEFORE A COMPLAINT TRIBUNAL
CONSISTING OF:

JUDGE SEBE DALE, JR.
HON. DAVID S. CRAWFORD
HON. EATON A. LANG, JR.

OPINION AND JUDGMENT

THIS MATTER CAME ON for hearing before this Tribunal on October 22, 1992 on the Motion for Summary Judgment filed by the Complainant, The Mississippi Bar ("the Bar") against Respondent, R. Charles Robb, III ("Mr. Robb") and Mr. Robb's Motion to

Dismiss. The Tribunal having denied Mr. Robb's Motion, granted the Bar's Motion, and held the matter under advisement for subsequent announcement of disciplinary action, now presents its Opinion and Judgment in this cause.

FINDINGS OF FACT

1. The Formal Complaint in this cause was filed on July 27, 1990 with an Amended Formal Complaint being filed on August 21, 1990. Mr. Robb's Answer was filed October 24, 1990. At all times hereinafter mentioned, Mr. Robb was a member of the Bar subject to the disciplinary jurisdiction of the Supreme Court of Mississippi and its designated agencies.

2. The Tribunal has jurisdiction over the parties and subject matter hereto.

3. During the years 1989 through 1991, Mr. Robb advertised his legal services through a means of public communication, to-wit: The Real Yellow Pages of the

1989-1990 and 1990-1991 editions of South Central Bell's Greater Jackson Telephone Book.

4. The above-referenced advertisements communicate that Mr. Robb practices in particular fields of law (auto-accidents, faulty products, medical negligence, worker's compensation, and bankruptcy), without using the following disclosure: "Listing of these previously mentioned areas of practice does not indicate any certification of expertise therein."

CONCLUSIONS OF LAW

Based on clear and convincing evidence, Mr. Robb has violated certain provisions of the Mississippi Rules of Professional Conduct for the Bar approved by the Mississippi Supreme Court being:

A. Rule 7.1(a) which provides that a lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's services;

B. Rule 7.2(f) which provides that if a public communication, other than an approved law list or law directory, refers to areas of law in which a lawyer performs or wishes to perform professional services, except those areas specifically governed by Rule 7.4(b), the public communication must include immediately after the listing the following statement: "Listing of these previously mentioned areas of practice does not indicate any certification therein." According to the Rule, any public communication through a written medium shall contain such statement in type no smaller that the largest size print used to list the areas of practice.

C. Rule 7.4(a) and (b) which provide that a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. In public communication of practice in particular

fields of law, however, a lawyer must include the aforesaid statement required by Rule 7.2(f).

Furthermore, a lawyer shall not state or imply that the lawyer is a specialist except as follows: A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation; a lawyer engaged in admiralty practice may use the designation "admiralty", "proctor in admiralty", or a phrase substantially similar designation.

D. §73-3-35 of the Mississippi Code of 1972, as Amended, the oath of attorneys, which requires the attorney demean himself with all good fidelity to the Court as well as to the client, to use no falsehood to delay any person's cause, and to support the Constitution of the State Of Mississippi.

Based upon clear and convincing evidence, it is the opinion of the Tribunal that Mr. Robb has demonstrated unprofessional and unethical conduct and conduct evincing unfitness for the practice of law which constitutes cause for the imposition of discipline.

JUDGMENT

That based upon the foregoing Findings of Fact and Conclusions of Law, it is hereby ordered, adjudged and decreed that:

1. Mr. Robb, be and is hereby issue a **PRIVATE REPRIMAND** for the conduct which is the subject of Cause No. 90-B-784.

2. When this Opinion and Judgment becomes final, the Clerk shall mail a copy of this Opinion and Judgment to the Honorable Michael B. Martz, P. O. Box 2168, Jackson, MS 39225-2168.

3. Mr. Robb shall pay unto the Bar the sum of $18.85 previously assessed by the Committee on Professional Responsibility

for the Bar, together with all actual, reasonable costs and expenses of this litigation, and that within ten (10) days of the date on which this Opinion and Judgment becomes final, the Bar shall file its Motion for Costs and Expenses and present same to this Tribunal.

4. That pursuant to Rule 8.6(ii) of the Rules of Discipline for the Bar, when this Opinion and Judgment becomes final, the Clerk shall forward an attested copy of same to the Judges of the Circuit and Chancery Courts in and for Warren County, Mississippi and for Hinds County, Mississippi with instructions to said Judges that the contents of this Opinion shall remain confidential.

5. That the Clerk of this Court shall immediately forward to the attorneys of record for the parties herein a copy of this Opinion and Judgment and that an attested copy of same shall be forwarded to

the Executive Director of The Mississippi Bar, at Post Office Box 2168, Jackson, MS 39225-2168.

6. That when this Opinion and Judgment become final, the contents of Cause No. 90-B-784, together with this Opinion and Judgment shall in other respects remain confidential and in full force and effect until further order of the Supreme Court Of Mississippi.

So Ordered, Adjudged and Decreed this the 5 day of April, 1993.

Judge Sebe Dale, Jr.
Presiding Judge

Hon. David S. Crawford

Hon. Eaton A. Lang, Jr.

Approved as to form
and Content:

The Mississippi Bar

By: John F. Davis
Attorney for Complainant
The Mississippi Bar

R. Charles Robb

By: R. Charles Robb
Respondent, Pro Se

Other Appended Materials

First Amendment, **The Constitution of the United States of America:**

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fifth Amendment, **The Constitution of the United States of America:**

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment, **The Constitution of the United States of America:**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any laws which shall abridge the privileges or immunities

of citizens of the United States; nor shall shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Mississippi Rules of Professional Responsibility:

Rule 7.1, Communications Concerning A Lawyer's Services.

A lawyer shall not make a false, deceptive or misleading communication about the lawyer or the lawyer's services. A communication is false, deceptive or misleading if it:

(a) contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement as a whole not materially misleading;

(b) is likely to create an unjustified expectation about results the lawyer can achieve, or states or implies that the lawyer can achieve results by means that violate the rules of professional conduct or other law; or

(c) compares the lawyer's services or fees with other lawyers' services of fees.

Rule 7.2(f), Advertising.

(a) Subject to the requirements of Rule 7.1, a lawyer may advertise services through public communication. The term "public communication" includes, but is not limited to, communication by means of television, radio, motion picture, newspaper, periodical, book, sign, display, directory, professional card, letterhead, listing or through written communication not involving solicita-

tion as defined in Rule 7.3.

(b) A copy or recording of an advertisement or written communication shall be kept for six years after its last dissemination along with a record of when and where it was used.

(c) A lawyer shall not give anything of value to a person for recommending the lawyer's services, except that a lawyer may pay reasonable costs of advertising or written communication permitted by this rule and may pay the usual charges of a not-for-profit lawyer referral service or other legal service organization.

(d) Any communication made pursuant to this rule shall include the name of at least one lawyer responsible for its content.

(e) If a public communication quotes a fixed fee to be charged for legal service, it shall contain immediately

after the quoted fee the following statement. "The Rules of Professional Conduct of the Mississippi State Bar require that the above services be performed by this lawyer (or firm) for not more than the advertised fee." Any public communication through an electronic medium shall contain such statement at a time and in a tone and manner so as clearly to convey the required information to the listener or viewer.

(f) If a public communication, other than an approved law list or law directory, refers to an area(s) of law in which a lawyer performs or wishes to perform professional services, except those areas specifically governed by Rule 7.4(b), the public communication must include immediately after the listing the following statement: "Listing of these previ-

ously mentioned area(s) of practice does not indicate any certification of expertise therein." Any public communication, through a written medium shall contain such statement in type no smaller than the largest size type used to list the areas of practice. Any public communication through an electronic medium shall contain such statement at a time and in a tone and manner so as clearly to convey the required information to the listener or viewer.

Rule 7.4, Communication Of Fields Of Practice.

(a) A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. In public communication of practice in particular fields of law, a lawyer must include the statement by Rule 7.2(f).

(b) A lawyer shall not state or imply that the lawyer is a specialist except as follows: (1) a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "patent attorney" or a substantially similar designation; (2) a lawyer engaged in admiralty practice may use the designation "admiralty" or a substantially similar designation.

Supreme Court, U.S.
FILED
MAR 23 1995
CLERK

No. 94-1781

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1994

ATTORNEY R.,

Petitioner,

V.

THE MISSISSIPPI BAR,

Respondent.

On Petition for Writ of Certiorari to the Mississippi Supreme Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Mississippi Supreme Court's requirement that a disclaimer implying that neither the Court nor the State of Mississippi has established a plan of certification or specialization for attorneys to be used in attorney's advertisements listing areas of practice is constitutional on its face?

2. Whether Rules 7.1, 7.2 and 7.4, Mississippi Rules of Professional Conduct, violate any of Attorney R's constitutional rights?

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The Mississippi Bar

Attorney R

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No. 94-1781

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1995

ATTORNEY R.,

Petitioner,

vs.

THE MISSISSIPPI BAR

Respondent.

On Petition for Writ of Certiorari to the Mississippi Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Petitioner, Attorney R, prayed that a Writ of Certiorari be issued to review the Judgment of the Supreme Court of Mississippi in this matter but has not presented persuasive reasons why certiorari should be granted.

OPINIONS BELOW

The ruling of the Mississippi Supreme Court from which the Petitioner seeks certiorari is included in the case styled *Attorney R. v. The Mississippi Bar* , 649 So. 2d. 820 (Miss. 1995), reproduced in Petitioner's Appendix dated April 26, 1995 wherein a Private Reprimand was issued to him (A 1a-20a). At trial, a Complaint Tribunal of the Mississippi Supreme Court also imposed a Private Reprimand, a decision affirmed by the Mississippi Supreme Court which heard the case de novo on the record made before the Complaint Tribunal. A copy of the Complaint Tribunal's decision is also included in Petitioner's Appendix. (A21a - 36a)

JURISDICTION

As grounds upon which Attorney R alleges this Court has jurisdiction, he represented that in its January 26, 1995 opinion the Mississippi Supreme Court held that Rules 7.1 (a and b), 7.2 (a and f) and 7.4 (a and b) of the Mississippi Rules of Professional Conduct as applied against him, were not unconstitutional or violative of his First Amendment right to freedom of speech.

However, in the opinion attributed to the Mississippi Supreme Court by Attorney R, produced in Attorney R's Appendix, the Mississippi Supreme Court only addressed Rules 7.1 (a), 7.2 (f) and 7.4 (a) and (b), MRPC. Rules 7.1 (b) and 7.2 (a) were not discussed in the Mississippi Supreme Court's opinion.

Regardless, the Bar denies that Attorney R has met the jurisdictional requirements of 28 USC §2101 (c) since 28 USC § 2101 (c) sets forth only the time limitations when an appeal or writ of certiorari must be filed with this Court. Therefore, the Mississippi Bar objects to this Court assuming jurisdiction over the instant Petition for Writ of Certiorari pursuant to the previous cited authority, said being, 28 USC §2101 (c).

Moreover, the Bar denies that the instant Petition for Writ of Certiorari is being filed pursuant to the provisions of Rule 10 (c) of this Court since the Mississippi Supreme Court has not decided an important issue of federal law in a way that conflicts with applicable decisions of this Court. The Mississippi Supreme Court's decision is consistent with this Court's decisions in *Bates v. State Bar of Arizona*, 433 US 350 (1977); *In Re R.M.J.*, 455 U.S. 191 (1982); *Peel v. Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990); and *Ibanez v. Florida Department of Business and Professional Regulation, Board of Accountancy*, 114 S. Ct. 2084 (1994).

SUMMARY OF THE ARGUMENT

United States Supreme Court Rule 10 (1) clearly sets forth the grounds which must be established in order for a Petition for a Writ of Certiorari to be granted:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." See Rule 10 (1), U. S. Supreme Court Rules.

In the case sub judice there simply does not exist any "special important reason" to grant Petitioner's request for a writ since Mississippi's disclaimer requirement is in accord with this Court's previous decisions in the *Bates, R.M.J., Peel* and *Ibanez* decisions. As such, this case does not present any federal or state constitutional questions that have not already been addressed nor does it present any question upon which there is a conflict between the way a State court has decided a federal question that is in conflict with the aforementioned decisions of this Court.

To justify a grant of "certiorari", the special and important reasons involved " must be more than "academic or episodic", the issues must "reach

constitutional dimensions". *Rice v. Sioux City Memorial Park Cemetery*, 349 U. S. 70 (1995). "[T]his Court does not sit to satisfy a scholarly interest. . . [n] or does it sit for the benefit of the particular litigant." *Rice*, 39 U.S. at 4 (citing *Mangum Import v. Cody*, 262 U. S. 159, 163 (1923)). As the Court in *Layne and Bowler Corporation v. Western Well Works, Inc.*, 261 U. S. 387 (1923), stated:

> [I]t is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal. Id. 261 U. S. at 393.

Accordingly the instant dispute does not justify the granting of this petition for writ of certiorari especially since this Court has already addressed the issue of whether a disclaimer can be required by a State for attorneys who advertise their legal services and abilities.

The test established by this Court in *Board of Trustees of State University of New York v. Fox*, 109 S. Ct. 3028 (1989) ("SUNY"), requires only a "reasonable fit" between a rule regulating commercial speech and the state interests it advances. The listing of areas of practice of law without use of the required disclaimer misleads the public and promotes uninformed decision making.

Mississippi's disclaimer requirement is drafted to let potential consumers of legal services know that the State of Mississippi has not established a plan of certification or specialization for attorneys in order that they will not be misled into believing that because an attorney advertises that he practices in certain areas of law he is no more qualified than other attorneys who practice in those same areas of the law but, for various reasons, don't advertise or if they do advertise, don't list areas of law or if they advertise they practice in certain areas of the law, use the required disclaimer.

Mississippi's rule clearly withstands scrutiny under the SUNY test. Indeed, Mississippi's disclaimer requirement not only constitutes a "reasonable fit" but it would meet the "least restrictive means" analysis announced in Central Hudson, a test which SUNY subsequently expressly modified. Moreover, the disclaimer requirement is not a ban, an issue most of the other advertising decisions this Court addressed involve, but instead is a requirement to disclose more information, not less, an encouragement given by this Court in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977); *In Re R.M.J.*,

455 U.S. 191 (1982); and, *Peel v. Illinois Attorney Registration and Disciplinary Commission*, 496 U.S. 91 (1990).

Finally, the Mississippi's disclaimer is not overly broad as was the disclaimer requirements denounced by this Court in *Ibanez v. Florida Department of Business and Profession Regulatory, Board of Accountancy*, 114 S. Ct. 2084 (1994). Given the interests involved, the nature of the disclaimer which advances those interests and the "reasonable fit" between how those interests are advanced while not unreasonably limiting Attorney R's freedom of speech, Mississippi's disclaimer meets all constitutional requirements.

STATEMENT OF THE CASE

On July 27, 1990, and August 21, 1990 the Mississippi Bar filed Formal Complaints in the Supreme Court of Mississippi, accusing Attorney R of publishing false, deceptive and misleading communications about his legal services since he did not include in his advertisements the required disclaimer indicating that the State of Mississippi did not have in effect, a plan of certification or specialization for lawyers or that he possessed a certification from one or more of the legitimate certifying organizations. In his advertisement, Attorney R listed certain areas of practice along with phrases, such as, "protect your rights", "need help", "bankruptcy - a fresh start, not a failure" and "problem solving was (his) profession". Attorney R answered the Formal Complaints by denying that his

advertisements included false, misleading and deceptive communications about the legal services he offered. He also denied that he was obligated to use the State mandated disclaimer. Furthermore, he affirmatively stated that the aforesaid disclaimer requirement violated his First Amendment freedom of speech and Fourteenth Amendment right to due process of law.

Subsequently, the Bar filed a Motion for Summary Judgment. In response, Attorney R filed a Motion to Dismiss which was overruled. The Bar's Motion for Summary Judgment was sustained. The Tribunal found Attorney R in violation of several of Mississippi's Rules of Professional Conduct including failing to use the required disclaimer and imposed a private reprimand on him for his violations. Attorney R appealed this decision to the Mississippi Supreme Court which affirmed the Tribunal's ruling, including imposition of a private reprimand. From that adverse decision, Attorney R petitions this Court for a Writ of Certiorari.

I. REASONS FOR NOT GRANTING WRIT OF CERTIORARI

RESPONSE TO PROPOSITION ONE

The Mississippi Supreme Court requires the following disclaimer to be used in communications listing areas of practice: "LISTING OF THESE PREVIOUSLY MENTIONED AREAS OF PRACTICE DOES NOT INDICATE ANY CERTIFICATION OF EXPERTISE THEREIN". See Mississippi Rules of Professional Conduct 7.2 (f). This requirement does not constitute an impermissible restraint on truthful commercial speech and does not conflict with decisions[1] of this Court relating to First Amendment safeguards. Consequently, notwithstanding Attorney R's conclusion. the Mississippi Supreme Court has not decided a question involving federal law in a way that conflicts with applicable decisions of this Court. Therefore, there does not exist any "strong reason for granting of certiorari". *Hudson v. Louisiana*, 450 U.S. 40, 42 (1991).

In his Petition for Writ of Certiorari, Attorney R concludes, without citing any part of the record, the Mississippi Supreme Court's mandated

[1]See *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980) and *Board of Trustees of State University of New York v. Fox*,, 109 S. Ct. 3028 (1989).

disclaimer is "on its face. . . equally as likely to create confusion among consuming public between the terms 'ability', 'competence', 'limited fields of practice of law' and 'specialty'. (Petition for Certiorari p. 19)

Petitioner offers no proof or support for his conclusion. He merely makes a presumption. His presumption misinterprets what the disclaimer is saying. The required disclaimer says, either by implication or directly, that the State of Mississippi has not established any plan of certification whereby an attorney may advertise that he has earned a certification of expertise in a particular area of law from the State of Mississippi or that he had earned the right to use the endorsement that he has been certified by a legitimate private certifying organization. Moreover, the Mississippi Supreme Court has decided that the required disclaimer includes valuable information which should be presented to potential consumers of legal services without which the consumers would be misled concerning the attorney's expertise in a particular field of law.

Mississippi does not limit the areas of practice the lawyer may advertise. Instead, through its disclaimer requirement, it is providing information that neither the Mississippi Supreme Court nor the State of Mississippi has established a method or

procedure to grant certification of expertise to a lawyer in any area of practice.[2]

The required disclaimer is not an absolute ban on advertisements which list areas of practice but is an attempt to provide more information, not less, a procedure which has been specifically authorized by this court. *Bates v. State Bar of Arizona*, 97 S. Ct. 2709; *In Re R.M.J.*, 455 U.S. 191, 201-203; *Peel v. Attorney Regulatory and Disciplinary Commission*. 496 U.S. 91, 110 S. Ct. 2281, 58 U.S. L.W. 4684 (1990).

In *Peel*, this Court held that states may require a disclaimer about a private certifying organization. It held that a state may require the use of a disclaimer that the National Board of Trial Advocacy is a private organization not affiliated with or sanctioned by the state or federal government or information about the National Board of Trial Advocacy's (NBTA) requirements for certification so that inferences drawn by consumers about the certified attorney's qualifications would be based on more complete knowledge of the meaning of the NBTA certification.

Mississippi's required use of a disclaimer is not a proscription on the listing of areas of practice but requires when an attorney chooses to list areas of practice such advertisement must also include a notice that there is no state certification of expertise

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[2] Rule 7.4 (b) (1 & 2), MRPC, provides a lawyer who practices "patent" law may use the designation "patent attorney" and an attorney who practices "admiralty" law may so indicate.

in the area of law mentioned in the advertisement. In *Peel*, this Court ruled that it was permissible for the state to believe that many inferences, such as, consumers may believe that the NBTA was a state or federal government certifying organization, could be drawn from an advertisement and gave authority for the State to address those concerns. Therefore, if a state determines that it serves a substantial state interest or interests, it could require a disclaimer. Moreover, if it is permissible for a state to adopt a disclaimer to require the providing of more information concerning a private organization's certifying process, then, it is likewise permissible for a state to require disclosure that the state has not adopted any plan of certification of expertise in a particular field of law.

Since the mere listing of areas of legal practice in an advertisement implies specialization, certification or expertise beyond that of the average lawyer, a state may require that a disclaimer inform the viewer that "the state does not certify specialization nor does the advertisement claim certification or expertise in a given area". *In Re Goldin*, 689 S. W. 2d 869 (Tenn. 1985). However, Attorney R's advertisements, which were before the Mississippi Supreme Court when it made its decision, contain more than a mere listing of areas of legal practice. Attorney R's advertisements are herein reproduced, in substantial part , for the Court's convenience.

NEED HELP?
PROBLEM SOLVING IS OUR PROFESSION

INJURED
AUTO ACCIDENT (Reproduction of gavel is here) BANKRUPTCY
A FRESH START
NOT A FAILURE

FAULTY PRODUCTS
MEDICAL NEGLIGENCE INDIVIDUAL & FARMER
DEBT ADJUSTMENTS PLANS

WORKERS COMPENSATION BUSINESS REORGANIZATION

LIQUIDATIONS

(Map where office is located) PROTECT YOUR RIGHTS [Map where office is located)
R. CHARLES ROBB, P.A.[3]
ATTORNEY AT LAW
922-1111

Consequently, the representations included in Attorney R's advertisements are:

1. If someone is injured, he can help;

2. Bankruptcy provides a fresh start, not a failure;

3. Attorney R will protect your rights; and

4. Problem solving is his profession.

When these representations are read in conjunction with the areas of law listed in Attorney R's advertisement, it is clear that the message being conveyed is Attorney R is uniquely qualified to provide "help", he can give someone "a fresh start",

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[3]A copy of Attorney R's advertisements are included herein in Appendices"1" and "2".

and he will "protect 'your' rights" with respect to the areas of practice listed in his advertisement.

The Mississippi Rules of Professional Conduct recognize the many decisions of this Court limiting the restrictions on advertising to allow prohibitions against false, deceptive and misleading advertising or which concern illegal activity. Consequently, each State must tailor its restrictions based upon this Court's decisions. Previously, this Court relied on the two part test set forth in *Central Hudson Gas and Electric Corporation v. Public Service Commission of New York* , 447 U.S. 557 (1980) to decide the constitutionality of restrictions on commercial speech. However, *Central Hudson's* reasoning has been modified by this Court's decision in *Board of Trustees of the State University of New York v. Fox*, 109 S. Ct. 3028 (1989) requiring only a "reasonable fit" between a rule regulating commercial speech and the state interests the rule advances. Nevertheless, the requirements established by *Central Hudson* are helpful to a discussion for not granting certiorari especially since Mississippi's required disclaimer meets the "least restrictive means" test announced in *Central Hudson*.

First, advertising that is false, misleading or deceptive or which concerns illegal activity may be banned outright. Second, even if an advertisement is not covered by the initial prohibition, a State may still restrict the offensive advertisements if the following requirements are met:

1. The governmental interests involved in the restricting are substantial;

2. The restrictions directly advance the governmental interests involved; and

3. The restrictions are no more restrictive than necessary to serve those interests.

Consequently, based upon the Supreme Court's analysis, a lawyer's advertisement may be prohibited if it is false, deceptive or misleading or concerns illegal activity. If the advertisement is not subject to regulation on these grounds, it still may be regulated if the second prong of the *Central Hudson* test is satisfied.

For example, in *In re R.M.J.*, 455 U.S. 191 (1982), this Court addressed the issue of how extensively a State may regulate the use of terms describing an area of practice on grounds that those connotations may be misleading. At issue in *R.M.J.* was whether a lawyer could be prohibited from using any terms describing areas of practice other than the terminology expressly permitted by a state disciplinary rule. This Court affirmed the proposition that "when the particular content or method of the advertising suggest that it is inherently misleading or when experience has proven that the advertising is subject to abuse, the states may impose appropriate sanctions". 455 U.S. 191, 203.

In R.M.J., the Court affirmed that inherently misleading advertising may be prohibited entirely. However, the Court also held that terms describing areas of practice are not inherently misleading. Therefore, regulations covering the use of such terms must be drafted in a way they would restrict the use of terms and circumstances in which they would be misleading. The Court said "the States may not place an absolute prohibition on certain types of potentially misleading information, e.g. a listing of areas of practice, if the information may also be presented in a way that is not deceptive". 455 U.S. 191, 203. Applying this reasoning, this Court held that the disciplinary rule under review in *R.M.J.* which prohibited the use of all terms describing areas of practice not specifically allowed by the rule constituted an unconstitutional restriction on commercial speech because it prohibited use of other terms which were not misleading.

However, this Court's analysis in *R.M.J.* is not applicable to the situation involving Attorney R for several reasons. First, unlike Missouri's Rules of Professional Conduct, the Mississippi Rules of Professional Conduct (MRPC) do not require the use of words of "art" to describe particular fields of practice. The terms condemned in *R.M.J.* are clearly permissible under the applicable MRPC. Second, the MRPC do not absolutely prohibit the use of certain words or phrases to describe an area of practice. All that Rule 7.4 (a), MPRC, requires is that when a lawyer communicates the fact that the lawyer practices in particular fields of law, he must use the notice or disclaimer required by 7.2 (f),

MRPC. This requirement is intended to require the dissemination of truthful and helpful information to the public who reads the attorney's advertisements. The truthful and helpful information being communicated by the disclaimer is the "State of Mississippi does not have a plan of specialization whereby an attorney can proclaim that he has obtained a higher degree of expertise in a particular area of law than any other attorney in Mississippi".

Disclosure notices or disclaimers have been encouraged by this Court in at least two cases. In the landmark case of *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), this Court said:

> ". . . we do not foreclose the possibility that some limited supplementation by way of warning or disclaimer or the like, may be required of even an advertisement of the kind ruled upon today so as to assure that the consumer is not misled. 97 S. Ct. 2691, 2709

And in *Peel*, 110 S. Ct. 2281 (1990) when this Court looked at the alternative to the impermissible overbroad ban on statements of private certifications or specialization held that "a state might consider . . . requiring a disclaimer about the certifying organization or the standard of the specialty." 110 U. S. at 2292. See also *Mezrano v. Alabama State*

Bar, 434 So. 2d 732 (Ala. 1983) where the Alabama Supreme Court upheld the constitutionality of a rule requiring a disclaimer that "no representation is made about the quality of the legal services to be performed or the expertise of the lawyer performing such services". In addition, in *Daves v. State Bar of Texas*, 691 S.W. 2d 784 (Court of Appeals of Texas, 1985) that Court upheld the constitutionality of Texas Disciplinary Rule 2-101 (c) (2) which requires the use of a disclaimer that the advertising attorney was "not certified by the Texas Board of Legal Specialization" when he advertised he could handle certain types of family law cases without disclosing his lack of certification.[4]

In upholding the constitutionality of Rule 2-101 (c) (2), the Texas Court held: "[w]e presume the Court intended DR 2-101 and so fashioned it, to comply with the restraints constitutionally permitted to prevent false, deceptive or misleading advertising" 691 S.W. 2d 784, 789.

As stated, Attorney R's advertisements include much more than a "mere listing of areas of practice". Through his use of phrases, "need help", "problem solving is our profession" and "bankruptcy - a fresh start, not a failure" he is representing to the readers of his advertisements that he is more qualified to "provide help", "solve the person's problems" and "through bankruptcy provide them with a fresh start, not a failure" than other attorneys. These representations, without presentation of his

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[4]The State of Texas has established a plan of certification.

qualifications to provide the quality of service he is representing, are inherently misleading or alternatively, potentially misleading. The Mississippi Bar argues that Attorney R's ads are both. Mississippi recognizes " the states may not place absolute prohibitions on certain types of potentially misleading information if the information may also be interpreted a way that is not deceptive." *R.M.J.* , 455 U.S. 191, 203.

Moreover, even if Attorney R's ads are not inherently misleading or potentially misleading they can be rejected if the state's restrictions satisfies the second prong of the *Central Hudson* test. Mississippi's disclaimer requirement satisfies this test because Mississippi has substantial governmental interests in regulating truthful and informative advertising. The restriction directly advances those governmental interests and the restriction is a "reasonable fit" to serve those interests.

First, the substantial governmental interests involved are to educate the public and assure readers of Attorney R's advertisements that they are being provided with truthful, accurate and not deceptive information about legal services they need and Attorney R's ability to provide those legal services. Two other state interests distinct from the interest in promoting informed decision making advanced by the Rules are facilitating the fair and effective administration of justice and the difficulty to police the advertisements (verify Attorney R's representations) because of the finite enforcement

resources of the state. See *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1958).

Second, the required use of a disclaimer directly advances those interests by requiring Attorney R to indicate that he is not certified by the State of Mississippi as an expert in any of the areas of law he is advertising. This requirement is uniformly applied to all attorneys who communicate they practice in any area of law except patent or admiralty. The "least restrictive means" test of *Central Hudson* is satisfied in this area, even though that test has been replaced by the "reasonable fit" test of *SUNY* which likewise has been met. Consequently, the required use of the disclaimer is a "reasonable fit" between Attorney R's right of freedom of speech and the State's right to reasonably regulate commercial speech which is no more extensive than necessary to serve the State of Mississippi's legitimate governmental interests. *Board of Trustees of the State University of New York v. Fox* , 109 S. Ct. 3028 (1989). *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico* , 478 U.S. 328, 341, 106 S. Ct. 2968, 2976-2977, 92 L. Ed 2d 266.

As long as the means are narrowly tailored to achieve the desired objective, it is for the governmental decision makers to judge what means or manner of regulation may be employed. *Board of Trustees of the State University of New York v. Fox* , 109 S. Ct. 3028, 3035 (1989). Therefore, Mississippi's required use of the disclaimer does not

constitute a ban. Instead it is a requirement intended to provide more information, not less.

In conclusion, under the test formulated in *SUNY,* Mississippi's required disclaimer clearly passes constitutional muster because it advances Mississippi interests and there is a "reasonable fit" between the rule and the ends it is designed to achieve". See *SUNY* at 109 S. Ct. 3032, 3035. Mississippi need only construct a reasonable fit. Mississippi has done that. Mississippi's disclaimer requirement meets the required constitutional requirements and, therefore, Attorney R's petition for writ of certiorari should be denied.

RESPONSE TO PROPOSITION TWO

The Mississippi Supreme Court has the inherent authority to adopt Rules of Professional Conduct that do not conflict with decisions of this Court involving the regulation of attorney advertisements requiring the use of a disclaimer that will make the advertisement more truthfully and informative. Mississippi's disclosure requirements are geared toward the "disclosure of accurate, truthful and relevant information that is more likely to make a positive contribution to decision making than is concealment of such information." *Peel v. Attorney Registration and Disciplinary Commission of Illinois* 496 U.S. 91, 108, 110 S. Ct. 2281,2292 (1990).

Attorney R argues that the Mississippi Supreme Court does not have the authority to

require disclosure of truthful, accurate and pertinent information in an attorney's advertisement, which the attorney did not disclose, under the premise that this Court's decision in *In Re RMJ*, 455 U.S. 191, 203 (1982) is limited to the words in the advertisement (underlining added as per Attorney R's emphasis). Attorney R acknowledges that the Mississippi Rule of Professional Conduct 7.1 (a) recognizes that a statement may be false, misleading or deceptive if it omits a statement which would make the communication as a whole misleading but insists the facts omitted must be inherently or potentially misleading. He further submits that this court has prohibited the use of permanent irrebuttable presumptions to justify this restriction as being unconstitutional. His argument is not persuasive.

The fact to be disclosed by use of the required disclaimer is this: the State of Mississippi has not established a plan of certification or specialization for attorneys licensed in the State of Mississippi. That is a fact, not a presumption. Neither Attorney R nor any other attorney can produce information or evidence to the contrary. Mississippi does not have such a plan of certification or specialization currently in effect. Consequently, Attorney R's reliance on *Cleveland Board of Education v. Lafleur* (Attorney R's citation was not able to be verified by the Bar) and *Vlandis v. Kline*, 412 U.S. 441, (1973) is misplaced. *Vlandis v. Kline* addressed Connecticut's irreversible and irrebuttable statutory presumption that because the legal address of a student, if married, was outside the state (of

Connecticut) at the time of application for admission, or if single, was outside the state at some point during the preceding year, he remained a non-resident as long as he is a student in Connecticut". 412 U.S. at 441.

In *Vlandis* , this Court ruled that it was a violation of the Fourteenth Amendment's due process clause for Connecticut to deny an individual the opportunity to present evidence that he is a bona fide resident entitled to in-state rates, on the basis of a permanent and irrebuttable presumption of non-residence, when that presumption is not necessarily or universally true in fact, and when the state of Connecticut had reasonable alternative means of making the crucial determination. Id at pp. 446-454.

In this case, Attorney R had the opportunity to present proof that Mississippi has established a plan of certification or specialization but because of the impossibility of being able to present that which does not exist, he couldn't. Therefore, he was not confronted with a irreversible presumption but a fact, an irrebuttable fact. In addition, he was authorized to present information that he had received certification from a private certifying organization, but he couldn't or didn't.

The disclaimer required to be used in this case is intended to materially advance substantial state interests in a manner that is no more extensive that necessary to serve those interests or at least a "reasonable fit" between the attorney's rights and the legitimate state interests involved. The manner in

which Attorney R's advertisements were presented are intended to convey the message that he is uniquely qualified, more so than similarly situated attorneys, to "solve problems", "give individuals a fresh start", "protect individuals rights" and provide" help" in those areas mentioned in his advertisements. The required disclaimer is not intended to ban the dissemination of truthful and accurate information. Instead, it is intended to require the disclosure of more truthful information, not less.

Moreover, because Attorney R's claims are not easily verifiable, if at all, the required disclaimer will make an even more positive contribution to the decision making process. [5]

However, even if there are legitimate, substantial, governmental interests involved, the required disclaimer must be a "reasonable fit" between the substantial governmental interests being advanced by this requirement and the restrictions shall be no more restrictive than necessary. In *Ibanez v. Florida Department of Business and Professional Regulations, Board of Accountancy*, 114 S. Ct. 2084, 2090 (1994) this Court condemned the use of a disclaimer that is too "detailed". The Florida disclaimer required:

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[5]For instance, if attorney R was certified by the National Board of Trial Advocacy, Civil Law, or The American Bankruptcy Board he could so advertise. These certifications are easily verifiable.

1. To be made in "the immediate proximity of the statement that implies formal recognition as a specialist";

2. Must state that the recognizing agency is not affiliated with or sanctioned by the state or federal government; and,

3. Must set out the recognizing agency's "requirements for recognition including, but not limited to educational, experience and testing. Id at 2090.

Mississippi's required disclaimer is comprised of sixteen (16) words totaling approximately 97 letters.[6] Accordingly, Mississippi's disclaimer requirement satisfies all of this Court's previous opinions and this Court should deny Attorney R's Petition for Writ of Certiorari. Moreover, Attorney R has not alleged that the required disclaimer is too long or extensive to destroy the intended message or appearance of his advertisements.

RESPONSE TO PROPOSITION THREE

Notwithstanding Attorney R's reservation to argue Proposition Three in the event certiorari is

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[6]Notwithstanding Attorney R's reference to the size of the print requirements, that requirement has not been enforced nor was Attorney R charged with violation of that portion of the subject rule. Furthermore, the Mississippi Supreme Court's ruling does not fault Petitioner for failing to meet this requirement. Therefore, that part of the rule was not before the Mississippi Supreme Court nor is it before this Court.

granted on either propositions one, two or both, the Bar responds that Attorney R was not deprived of equal protection of the law afforded him by the Fourteenth Amendment of the Constitution of the United States of America when he was sanctioned for failing to include the required disclaimer in his advertisement and his other consequent violations of the Mississippi Rules of Professional Conduct.

CONCLUSION

States may prohibit inherently misleading advertisements. Alternatively, States may prohibit potentially misleading advertisements provided the test announced in the *SUNY* case is met. That test has been satisfied. Mississippi's required disclaimer is intended to produce disclosure of more truthful and pertinent information, not less. It is intended to inform the readers of attorney advertising that if an attorney chooses to list areas of practice in his public communications, then, he must also inform those readers that his listing of areas of practice does not indicate that he possesses any certification of expertise therein by the State of Mississippi or any agency of the State of Mississippi that is any different than that possessed by any other attorney licensed to practice law by the State of Mississippi.

Accordingly, certiorari should be denied.

Respectfully Submitted,

The Mississippi Bar

BY:

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NEED HELP?

★ PROBLEM SOLVING IS OUR PROFESSION ★

INJURED?

- AUTO ACCIDENTS
- FAULTY PRODUCTS
- MEDICAL NEGLIGENCE
- WORKERS' COMPENSATION

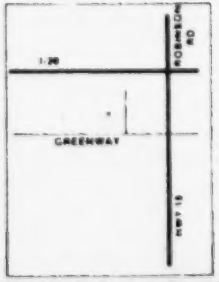
BANKRUPTCY

A FRESH START
NOT A FAILURE

- INDIVIDUAL & FARMER DEBT ADJUSTMENT PLANS
- BUSINESS REORGANIZATIONS
- LIQUIDATIONS

PROTECT YOUR RIGHTS

HWY. 18 (I-20)
JACKSON



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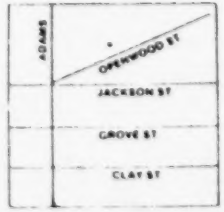
R. CHARLES ROBB, P.A.

ATTORNEY AT LAW

922-1111

1115 OPENWOOD
VICKSBURG



The Real Yellow Pages™ 039436 BellSouth Advertising & Publishing Corporation

NEED HELP?

★ PROBLEM SOLVING IS OUR PROFESSION ★

INJURED?

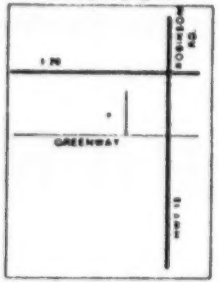
- AUTO ACCIDENTS
- FAULTY PRODUCTS
- MEDICAL NEGLIGENCE
- WORKERS' COMPENSATION

BANKRUPTCY
A FRESH START
NOT A FAILURE

- INDIVIDUAL & FARMER DEBT ADJUSTMENT PLANS
- BUSINESS REORGANIZATIONS
- LIQUIDATIONS

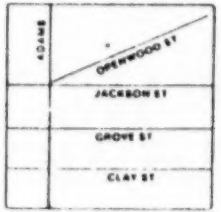
PROTECT YOUR RIGHTS

HWY. 18 (I-20)
JACKSON



AJ414

1115 OPENWOOD
VICKSBURG



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922-1111

APPENDIX "2"

Supreme Court, U.S.
FILED
JUL 14 1995
CLERK

No. 94-1781

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ATTORNEY R,

Petitioner

v.

THE MISSISSIPPI BAR,

Respondent

On Petition For Writ Of Certiorari
To The Supreme Court Of Mississippi

AMENDED APPENDIX

R. Charles Robb,
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July 14, 1995

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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

RICHARD B. SCHWARTZ, LANCE L. STEVENS, ANDY STEWART, MARK W. DAVIS, GUICE & GUICE, INC., RICHARD SACKETT EXECUTIVE CONSULTANTS, INC., MISSISSIPPI ASSOCIATION OF BROADCASTERS, AND PUBLIC CITIZEN, INC.

PLAINTIFFS

VS. **CIVIL ACTION NO. 3:94-CV-569BN**

W. SCOTT WELCH, III, PRESIDENT, THE MISSISSIPPI BAR; L.F. SAMS, JR., FIRST VICE PRESIDENT AND PRESIDENT-ELECT, THE MISSISSIPPI BAR; PAULA A. GRAVES, SECOND VICE PRESIDENT, THE MISSISSIPPI BAR; BILLIE J. GRAHAM, CHAIRMAN, COMMITTEE ON PROFESSIONAL RESPONSIBILITY, THE MISSISSIPPI BAR; DONALD C. DORNAN, JR., BENJAMIN E. GRIFFITH, AVA N. JACKSON, JOHN G. JONES, AND T. CALVIN WELLS, MEMBERS OF THE COMPLAINTS COMMITTEE, THE MISSISSIPPI BAR

DEFENDANTS

RULING OF THE COURT

I. INTRODUCTION

The Court has conducted a bench trial of this matter and has considered the testimony, the other evidence presented into the record, the briefs and closing arguments of counsel.

The Court enters its opinion by way of these findings of fact and conclusions of law.

This is a declaratory judgment action, wherein Plaintiffs, under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. §1983, challenge the constitutionality of certain of the Amendments to Rule 7, Information About Legal Services, Mississippi Rules of Professional Conduct ("the new Rules"), as promulgated by the Supreme Court of Mississippi on June 22, 1994. The new Rules restrict lawyer advertising in various ways, and Defendants in this action have enforcement authority over those Rules. Plaintiffs are four attorneys, licensed and actively engaged in the practice of law in Mississippi,[1] two advertising and public relations corporations, both authorized to do and doing business in Mississippi ("the advertising agency Plaintiffs"),[2] the Mississippi Association of Broadcasters ("MAB," or "the media plaintiffs"),[3] and Public Citizen, Inc. ("Public Citizen"), a consumer advocacy organization.[4] Defendants are W. Scott Welch, III, President of The Mississippi Bar, L.F. Sams, Jr.,

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[1] These attorneys are Richard B. Schwartz, Lance L. Stevens, Andy Stewart and Mark W. Davis.

[2] These firms are Guice & Guice, Inc., based in Biloxi, Mississippi, and Richard Sackett Executive Consultants, Inc., based in New Orleans, Louisiana. Both firms have assisted one or more of the lawyer plaintiffs in preparing television advertisements that have been telecast in Mississippi.

[3] MAB is comprised of some fifteen Mississippi-based television stations and 120 Mississippi-based radio stations, many of which have broadcast advertisements by the lawyer plaintiffs.

[4] Public Citizen claims a nationwide membership of over 140,000, "approximately 462 of whom reside in Mississippi and are persons who in the past have been, at present are, and some of whom will in the future be in the market in Mississippi for competent legal services . . . ." Compl. at 5.

President-Elect of The Mississippi Bar, Paula Graves, Second Vice President of The Mississippi Bar, and the Chairman and members of the Committee on Professional Responsibility, formerly known as the Complaints Committee, of The Mississippi Bar.[5] Each of the Defendants is sued in his official capacity. Each of the lawyer Plaintiffs claims he has been forced to restrict or discontinue one or more of the advertisements he has used in the past or wishes to use now, or risk prosecution and discipline by Defendants. The advertising agency Plaintiffs contend that, because the new Rules prohibit or restrict certain advertising techniques, they are hindered in their ability to propose and prepare advertisements for the lawyer Plaintiffs who comply with the new Rules. They also claim they will suffer a loss of income, due to reduction in volume of broadcast advertising as a direct result of the new Rules. MAB also claims its members will lose income because the new Rules will decrease the volume of broadcast advertising by lawyers. Public Citizen claims the new Rules will deprive its members and all Mississippians of information regarding the availability and price of legal services.

A. Procedural Background

Plaintiffs commenced this action on September 21, 1994. On October 13, 1994, they filed a Motion for Preliminary Injunction, and on November 14, 1994, this Court entered a Consent Order advancing the case on its docket for trial on the merits in lieu of hearing the Motion for Preliminary Injunction and providing for a moratorium on enforcement of the

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[5] The Chairman of the Committee is Billie J. Graham. Members of the Committee are Donald C. Dornan, Jr., Benjamin E. Griffith, Ava N. Jackson, John G. Jones, and T. Calvin Wells.

new Rules with two exceptions. The Order provided that the disclosures required by Rules 7.2(d)[6] and 7.6[7] would remain in full force and effect. This Court conducted a bench trial of this matter from February 27 through March 2, 1995.

B. The Challenged Rules[8]

Plaintiffs challenge the new Rules 7.1, 7.2 and 7.6, as follows:

(1) The mandatory disclosure requirement of Rule 7.2(d) for all lawyer advertisements, which requires use of these words:

The Mississippi Supreme Court advises that a decision on legal services is important and should not be based solely on advertisements.

(2) The mandate of Rule 7.6(a) that any advertisement suggesting an area of practice include the following statement:

Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein.

(3) The mandatory disclosure requirement of Rule 7.2(l), which states:

All advertisements and written communications provided for under these Rules shall disclose the geographic location,

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[6] Rule 7.2(d) requires that all broadcast advertisements state "The Mississippi Supreme Court advises that a decision on legal services is important and should not be based solely on advertisements."

[7] Rule 7.6 provides that, if the advertisement communicates that a lawyer practices in a particular field, it must state that "Listing of these previously mentioned area(s) of practice does not indicate any certification of expertise therein."

[8] Although the Court will discuss each of the Rules in the body of this Opinion and Order, it attaches as Appendix A both the challenged Rules and the Comments thereto.

by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law. If the office location is outside a city or town, the county in which the office is located must be disclosed.

(4) The disclosure required by Rule 7.2(h) which states:

Every advertisement and written communication that contains information about the lawyer's fee, including those which indicate no fee will be charged in the absence of a recovery, shall disclose whether the client will be liable for any expenses in addition to the fee.

(5) The disclosure required by Rule 7.1(a), "as authoritatively interpreted through Official Comments,"[9] that prohibits an advertisement for a law firm which states that all of the firm's lawyers are juris doctors but does not disclose that a juris doctorate is a law degree rather than a medical degree of some sort and that virtually any law firm in the United States can make the same claim.

(6) The disclosure required by Rule 7.2(b) providing that, if the single voice otherwise allowed in an advertisement by Rule 7.2(b) is not that of an attorney affiliated with the firm or a full time employee of the firm, there shall be prominently displayed at the beginning and end of said advertisement either orally or in writing, a notice to the public in the following form: "Actor portrayal" and/or "Paid Endorsement."

Plaintiffs challenge the new Rules individually, but also request that the Court strike them down collectively, arguing that Defendants cannot prove that the new Rules, individually or as a group, are a justified, constitutional restriction of Plaintiffs' commercial speech rights.

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[9] The Court addresses the effect of the guidance provided by the Comments elsewhere in its Opinion.

II. CONCLUSIONS OF LAW

A. Standing of Advertising, Media and Consumer Plaintiffs

Defendants challenge the standing to bring this action of the advertising firm Plaintiffs, the media Plaintiffs, and the consumer Plaintiffs. They do not challenge the standing of the lawyer Plaintiffs. The Court holds that each of these groups, through pleadings and evidence presented at trial, have proven they are proper plaintiffs in this lawsuit. While the Court recognizes it is "under an independent obligation to examine [its] own jurisdiction," FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990) (citing Allen v. Wright, 468 U.S. 737, 750 (1984)), and that standing may not be "inferred argumentatively from averments in the pleadings," id. (citing Grace v. American Central Ins. Co., 109 U.S. 278, 284 (1883)), the Court finds that Plaintiffs have presented evidence of particularized injury sufficient to support standing to sue in this case. See id. (stating that evidence of standing "must affirmatively appear in the record") (citing Mansfield C. & L.M.R. Co. v. Swan, 111 U.S. 379 (1884)).

The United States Supreme Court has written that "the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides." Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 651 (1985). That value to consumers, and the specific allegations of injury of the Plaintiff members of Public Citizen, Inc., is sufficient to provide standing to the consumer Plaintiffs. As to the advertising agency and media Plaintiffs, the Court holds that they, too, have standing to bring this suit.

The Supreme Court addressed the issue of advertiser

standing in Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981), wherein the advertiser plaintiffs challenged the validity of a municipal ordinance prohibiting certain outdoor advertising displays. Plaintiffs brought suit to enjoin enforcement of the ordinance. In resolving the standing issue in favor of the plaintiffs, the Court wrote:

> [W]e have never held that one with a "commercial interest" in speech also cannot challenge the facial validity of a statute on the grounds of its substantial infringement of the First Amendment interests of others. Were it otherwise, newspapers, radio stations, movie theaters and producers -- often those with the highest interest and the largest stake in a First Amendment controversy -- would not be able to challenge government limitations on speech as substantially overbroad.

Metromedia, 453 U.S. at 504 n.11. The Court then applied the four-part test from Central Hudson Gas & Electric Corp. v. Public Service Comm'n, 447 U.S. 557, 563-566 (1980)[10] for determining validity of government restrictions on commercial speech, id. at 507, and held that the ordinance was invalid under the First Amendment. Id. at 521. Although Metromedia involved advertising plaintiffs, this Court holds

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[10] The Central Hudson four-part test for determining the validity of government restrictions on commercial speech is as follows:

> (1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected commercial speech is valid only if it (2) seeks to implement a substantial governmental interest, (3) directly advances that interest, and (4) reaches no further than necessary to accomplish the given objective.

Central Hudson, 447 U.S. at 563-66, construed in Metromedia, 453 U.S. at 507.

that the reasoning of the Court in that case applies to media Plaintiffs, as well as the advertising agency Plaintiffs, in the case at bar.

Pursuant to the requirements laid out by the Fifth Circuit in Finch v. Mississippi State Medical Ass'n, Inc., 585 F.2d 765 (5th Cir. 1978), all the Plaintiffs have "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Finch, 585 F.2d at 771 (citations omitted). Accordingly, the Court holds that all Plaintiffs have standing sufficient to bring this lawsuit.

B. Applicable Legal Standard

The Supreme Court has held that lawyer advertising is commercial expression to which protections of the First Amendment apply, and Defendants do not claim otherwise. See, e.g., Peel v. Attorney Registration & Disciplinary Comm'n, 496 U.S. 91 (1990); Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626 (1985). The question before the Court in this case, then, is whether the new Rules unconstitutionally ban speech that is not false, deceptive, or misleading, or restrict such speech without "a showing that the restriction directly and materially advances a substantial state interest in a manner no more extensive than necessary to serve that interest." Ibanez v. Florida Dep't of Business and Professional Regulation, Bd. of Accountancy, 114 S. Ct. 2084, 2085 (1994).

Defendants claim the central dispute in this case is whether Plaintiffs' challenge to the new Rules is a "facial challenge" or an "as applied" challenge. Defendants claim that since no Plaintiffs are being prosecuted for a violation of any of the

new Rules, this action presents a facial challenge, and Plaintiffs therefore have the burden to show that no set of circumstances exist under which the rules would be valid. Defs.' Proposed Conc. of Law, ¶ 1. Although the distinction between the two standards is important,[11] the Court has little difficulty concluding that this case involves an "as applied" challenge to the new rules, and that the rules therefore should be scrutinized under the Central Hudson test for constitutionality. The Court finds that Defendants take an overly narrow view of what must occur for state regulations to be "applied" to Plaintiffs. Defendants essentially argue that, unless and until the State takes steps to enforce its regulations, Plaintiffs may not mount an "as applied" attack, and are limited instead to a facial challenge. This contention is not supported by Supreme Court rulings on commercial speech rights.

The Court finds that Plaintiffs here are in the precise legal posture as the plaintiff Scott Fane ("Fane") in the recent case of Edenfield v. Fane, 113 S. Ct. 1792 (1993). In Edenfield, Fane sought declaratory and injunctive relief barring enforcement of Florida rules prohibiting in-person solicitation by certified public accountants, on the ground that the rules violated the First Amendment. Though the state had taken no enforcement action against Fane, he alleged "that but for the

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[11] Depending upon how the challenge is construed, it dramatically shifts the burdens of proof of the parties. Defendants argue that "the Plaintiffs have the burden of showing that the challenged rules can never be effective in limiting misleading or deceptive lawyer advertising or potentially misleading or deceptive lawyer advertising." Defs.' Proposed Concl. of Law, ¶ 1. Plaintiffs argue that since the new advertising rules "directly and immediately impact them adversely," Defendants carry the burden of justifying the new regulations under the applicable First Amendment commercial speech legal standard.

prohibition he would seek clients through personal solicitation and would offer fees below prevailing rates." Fane, 113 S. Ct. at 1797. In its decision the Court wrote:

> It is well established that "[t]he party seeking to uphold a restriction on commercial speech carries the burden of justifying it." Bolger v. Youngs Drug Products Corp., 463 U.S. 60, 71, n.20, 103 S. Ct. 2875, 2883, n. 20, 77 L. Ed. 2d 469(1983); Fox, 492 U.S. at 480, 109 S. Ct. at 3035. This burden is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree [additional citations omitted].

Id. at 1800. Just as in Metromedia, the Court went on to apply the Central Hudson test, reserved, as the Defendants claim, for those cases involving "as applied" challenges.

Although Defendants are correct that all lawyer advertising cases heretofore have reached the high court on appeal from impositions of sanctions, this Court does not find this legal coincidence dispositive. Each of the lawyer advertising cases that has reached the Supreme Court has been viewed by the Court as an "as applied" case, and in each case the Court applied the Central Hudson test. Metromedia, Inc. v. San Diego, though not a lawyer advertising case, involved the same legal considerations as the lawyer advertising cases and as the present case. In that case, as discussed above, no enforcement actions had been instituted against plaintiff outdoor advertisers, yet the Supreme Court applied the Central Hudson test.

Finally, the Court is persuaded by Plaintiffs' argument

that, were they not able to bring an action for declaratory and injunctive relief before proceedings were instituted against a particular lawyer Plaintiff, they effectively would be deprived of a federal forum to hear their case, short of appeal from the Mississippi Supreme Court to the United States Supreme Court. If Defendants were correct that the only way to obtain "as applied" review is to await an enforcement action, then, since federalism principles would require the federal court to abstain during the pendency of such enforcement proceeding, see, e.g., Middlesex County Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423, 436-37 (1982); Younger v. Harris, 401 U.S. 37 (1971), Plaintiffs' declaratory and injunctive claims under 42 U.S.C. §1983 could not be pursued in federal court. Defendants' contention simply is not consistent with current law. Defendants have pointed the Court to no commercial speech case in which the Central Hudson test was not applied, and the Court holds that that test should apply in this case.[12]

C. Application of Commercial Speech Analysis[13]

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[12] The United States Court of Appeals for the Eleventh Circuit came to the same conclusion when, quite recently, it was presented with the same question. See Jacobs v. Florida Bar, No. 93-2933, 1995 WL 125883 (11th Cir. Apr. 10, 1995) (holding, in challenge to Florida lawyer advertising rules, where no enforcement action had yet been taken, that district court should have placed burden of proof on the Florida Bar, using "as applied" model). See also Texans Against Censorship, Inc. v. State Bar of Texas, No. 3:94 CV 61, slip op. at 38 (E.D. Tex. Mar. 31, 1995) (holding that "Defendants carry the burden of vindicating the amended rules").

[13] The Court draws its legal analytical structure for this section from the recent Supreme Court opinion in Ibanez, 114 S. Ct. at 2088-89. The United States Court of Appeals for the Eleventh Circuit came to the same conclusion when, quite recently, it was presented with the same question. See Jacobs v. Florida

Because "disclosure of truthful, relevant information is more likely to make a positive contribution to decisionmaking than is concealment of such information," Peel, 496 U.S. at 108 (1990), only false, deceptive, or misleading commercial speech may be banned. Ibanez, 114 S. Ct. 2084, 2088 (citing Zauderer, 471 U.S. at 638. Stated another way, "[t]ruthful advertising related to lawful activities is entitled to the protections of the First Amendment . . . . Misleading advertising may be prohibited entirely." In re R.M.J., 455 U.S. 191, 203 (1982), cited in Ibanez, 114 S. Ct. at 2088.

Although commercial speech that is not false, deceptive, or misleading may not be banned, it may be restricted. Central Hudson, 447 U.S. at 566. However, the State may only restrict such commercial speech if it shows that the restriction directly and materially advances a substantial state interest in a manner that is no more extensive than necessary to serve that interest. Id. The State regulation will not be sustained if it "provides only ineffective or remote support for the government's purpose," id. at 564, and the regulation must advance a substantial state interest in a "direct and material way" and be in "reasonable proportion to the interests served." Edenfield, 113 S. Ct. at 1798.

The State Defendants in this case essentially placed all their eggs in the basket of their contention that the Court should analyze Plaintiffs' claim under a facial challenge model. Defendants all but conceded at closing arguments that

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they came to Court to prove no more than that there were conceivable circumstances under which the new Rules could be constitutional, and if they lost the battle on the burden of proof, then they were not prepared to fight the remainder of the war. The Court, having ruled that Plaintiffs' "as applied" model is the correct one in this case, is left largely to test the new Rules under the Central Hudson test, under evidence presented chiefly by the Plaintiffs.

D. Summary of Testimony

1. Plaintiffs' Case-in-Chief

Plaintiffs' first attorney witness was Richard Schwartz, a practicing attorney in Mississippi since 1981. He has advertised since 1989, using television advertisements, the Yellow Pages, and billboards. Though he was offered free sixty second radio spots, and had advertisements prepared by an ad agency, he claims the required disclaimers made the ads ineffective, so he did not take advantage of the free air time. He stated that he uses the Sackett advertising agency, the president of which, Richard Sackett, testified later at trial. Schwartz objected to all of the new Rules, and would use each of the prohibited techniques if they were permitted.

Andy Stewart, a practicing attorney since 1990, testified that he has been advertising since May 1992, using the Yellow Pages, newspapers, a few television ads, and the "Consumer Tips" telephone dial ads. Stewart also objected to all the new Rules. He explained that the Consumer Tips ads run thirty seconds, and that the required disclaimers took eight to twelve seconds of that time. He stated that, prior to the use of disclaimers he was receiving 34 to 36 direct connects to his officer per month, and after the disclaimers were required, he received 28 to 29.

Mark Davis, who has been practicing law since 1984, has advertised since July 1989, using television, the Yellow Pages, and the newspaper. He also objected to all the rules, explaining that he has used most of the techniques banned by the new Rules, and would use them in the future if permitted. Davis uses the Guice ad agency, the second of the two advertising corporation Plaintiffs in this case.

The final of the four lawyer Plaintiffs is Lance Stevens, a practicing attorney since 1988. He has been advertising for three and a half years, using television ads produced by R.W. Lynch Company for nation-wide use, tailored to the local lawyer. He testified that he has used several of the techniques banned by the new Rules, and would use them again if permitted.

Reed Guice, president and chief operating officer of Guice & Guice, Inc. advertising agency in Biloxi, Mississippi, testified that he handles advertising for Davis and Goldberg. He stated that, from an advertising perspective, he saw no reason to approach lawyer advertising any differently from other service advertising. Guice went through each of the new Rules, and gave reasons why each detracted from either the effect of the advertisements that he could produce, or eliminated altogether proven, effective, advertising techniques.

Richard Sackett, chief executive officer and chairman of the board of Richard Sackett Executive Consultants of New Orleans, Louisiana, represents Richard Schwartz as his advertising agent. He claims his agency is one of the few large ad agencies handling mostly lawyer advertising. Sackett explained how he has changed Schwartz' advertisements to conform to the "spirit of the new Rules," but claimed that he did not know if it would be possible to conform to the letter of

those Rules. He argued that any ad in strict conformance would be so cluttered with disclosures as to be ineffective. He took issue particularly with the ban on the use of testimonials, noting that testimonials are one of the basic methods of advertising, and a method easy to regulate. Either customers or bar regulators would need only to go to the person offering the testimonial to confirm its truth. Sackett also explained how each of the rules impinged on basic advertising methods, commonly used for advertisements in other service areas.

Charles Wolfram, a law professor from Cornell University who teaches in the field of professional responsibility, and a reporter for the American Law Institute committee writing Restatement of Law Governing Lawyers, gave a brief history of lawyer advertising. He noted that Abraham Lincoln advertised, and that advertising by lawyers was common until the end of the Nineteenth Century, when the notion developed within the profession that advertising made lawyers look like businessmen or tradesmen. He claimed that the profession first used peer pressure to regulate advertising, then restrictive rules until Bates in 1977.

Professor Wolfram also noted the bad image lawyers have always had, stating that at no time in recorded history had lawyers been viewed positively. He attributed this negative image to the kind of work that lawyers do, and to the human foibles of the lawyers themselves, rather than to lawyer advertising. He stated that there are no studies which indicate any correlation between lawyer advertising and the poor public image of lawyers.

Professor Wolfram took issue with each of the new Rules at issue in this case. He stated that the rules, as a group, are more restrictive than those of all but a very few states,

and far more restrictive than Bates requires. He testified that most states use the ABA Model Rules, which simply prohibit false, deceptive and misleading advertising. Professor Wolfram also pointed out some deficiencies in the individual rules. As to the prohibition against testimonials and dramatizations, he stated that he could not define what the Mississippi Bar meant by "testimonials," and in any case could find no problem with the use of either testimonials or dramatizations, so long as they were true. He questioned the prohibition against "self-laudatory" advertisements, noting that advertising is self-laudatory by its very nature, emphasizing as it does the qualities of the goods or services advertised. He also attacked the use of disclosures, claiming they tend to make viewers of the advertisement distrust the message, the lawyer generating that message, and the legal profession itself.

Keith Murray, a marketing professor from Bryant College in Smithfield, Rhode Island, explained basic marketing principles to the Court. He stated that the basic concept underlying service marketing is providing the kinds of information consumers want to hear. If the potential message is retarded by overly-restrictive rules, then consumers are not able to receive the information they need. Professor Murray also took issue with most of the rules from a marketing standpoint, and criticized some of the studies relied upon by the Defendants in formulating the new Rules.

Marcelene Johnson, a "practice development coordinator" from Chicago, and past president of the National Law Firm Marketing Association, testified about her marketing work for four large, Chicago area law firms. She has developed bro chures and other advertising programs, but has done no television advertising. She is a public member of the ABA Com-

mission on Advertising, which developed "Awards for Dignity," a system for rewarding advertisements deemed "dignified." The Commission solicited nominees through flyers mailed to law firms and Johnson noted that in both 1992 and 1993, the Commission received over 150 submissions for the awards.

Johnson also helped prepare the "Crossroads" report on lawyer advertising. She described the series of hearings, surveys, and wide spectrum of views and interests that went into the preparation of the report, which was presented at the 1994 mid-year meeting of the ABA. She testified that the report concluded that there was no evidence that disclosures or disclaimers protected the image of the legal profession. In fact, the Commission found that restrictive disclosures and disclaimers were detrimental to the image of the profession. She also testified that the Commission found no evidence of problems resulting from the use of testimonials, self-laudatory statements, assurances of quality, dramatizations, more than one voice, background sounds, or slogans. The Commission concluded that the public was used to advertising in all its forms, and was not misled by common advertising techniques. It should be noted that the report has not been adopted by the House of Delegates.

Stuart Kellogg, General manager of Jackson television station WAPT channel 16 and member of the Mississippi Association of Broadcasters, testified that his station has carried lawyer advertising since the early 1960s. He noted that such ads have always been subject to Federal Trade Commission ("FTC") rules and regulations prohibiting false and misleading advertising. He also testified that testimonials are one of the most effective tools available to advertisers, and that banning them decreases the effectiveness of the advertisements, and

hereby lessens the revenue of his station and of other stations who are members of the Mississippi Association of Broadcasters.

The Court also received into evidence the deposition of Dan Modisett, president elect of the Mississippi Association of Broadcasters, past president of Jackson Broadcasters, and past president of Greater Jackson Advertising. His testimony was similar to Kellogg's, as he noted the difficulties in creating effective thirty second television or radio advertisements, given the restrictions of the new Rules. He stated that the interests of the media Plaintiffs in this case is two-fold, including loss of potential advertisements, and reduction in First Amendment rights to broadcast information to viewers. He also noted that all lawyer advertising, like other advertising, is subject to FTC regulations restricting false or misleading advertising, and that his station had never received any complaints from the FTC about lawyer advertising.

Finally, the Court heard from Evans Harrington, a retired English professor and member of Public Citizen, Inc. He stated that he had seen lawyer advertisements in Oxford, Mississippi, and that a reduction in lawyer advertising would personally affect him, as he found the ads he had seen to be instructive about the law and about lawyers themselves.

2. Defendants' Case-in-Chief

Defendants offered two witnesses. Professor Richard Mizerski, professor of marketing at Florida State University, testified that lawyer advertising is different from other forms of service advertising because (1) it is difficult for non-lawyers to evaluate the performance of lawyers; (2) legal "business" has more risk than other forms of personal service because money and emotions are often involved; (3) the search for

lawyers by individuals tends to be a limited one, since people often stay with the first lawyer they visit; and (4) people are hesitant to terminate the services of lawyers. His testimony on the new Rules was consistent with Defendants' "facial challenge" defense theory. He stated that the practices barred by each of the new Rules could be misleading under some circumstances. He stated that the use of performance results and background voices "could be misleading," that the use of more than one voice "could conceivably be misleading," that the use of slogans "can be misleading," and that the use of celebrity voices was a "potentially misleading device." On cross examination he admitted that he could "conceive of ads that are not deceptive," containing each of the proscribed practices. He also stated that the FTC permits each of the banned advertising techniques.

The second and final defense witness was W. Scott Welch, III, President of the Mississippi Bar Association. He explained the involvement of the State Bar in lawyer advertising, including the appointment of a task force to study advertising, the holding of hearings statewide, the initial proposal of rules and subsequent modification in response to objections from advertising attorneys, and the final adoption of the new Rules by the Mississippi Supreme Court. He explained the specific concerns which the Bar had over the possible misleading or deceptive effect of each of the techniques proscribed by the Rules, and, like Professor Mizerski, noted that all the banned techniques could mislead the public. He also disagreed with testimony by several of Plaintiff's witnesses that advertisements do not affect the image of attorneys in the eyes of the public.

III. HOLDING OF THE COURT

A. Defendants Did Not Carry Their Burden of Proof

The Plaintiffs challenged the new Rules individually and in toto, and the Defendants had the heavy burden of vindicating those rules under the Central Hudson standard. To withstand constitutional scrutiny, Defendants had to establish that each of the challenged new Rules directly advances a stated (and substantial) governmental interest, and is no broader than reasonably necessary to serve that interest. See Edenfield, 113S. Ct. at 1800. Stated differently, Defendants had a constitutionally imposed burden to develop a record demonstrating that each of the new Rules, and that the Rules in the aggregate, passed muster under the First Amendment. Defendants, however, ignored their burden in their case-in-chief, believing the onus was on Plaintiffs to prove the new Rules are unconstitutional.

In pre-trial briefs and in closing arguments, Defendants admitted that the Court was hearing "dual" cases, one tried by Plaintiffs under the "as applied" analysis, and one by Defendants under the "facial challenge" analysis. The Defendants gambled their entire case on the legal assumption that they only needed to prove that the new Rules could, conceivably, be applied in a constitutional manner. The Plaintiffs, on the other hand, placed evidence before the Court that the new Rules do not necessarily restrict false, misleading or deceptive advertising, and that they do not directly advance the governmental interest claimed. That evidence went unrebutted.

Having ruled that the Plaintiffs proceeded under the prop-

er legal standard, see supra pp. 8-11, the Court finds itself in the awkward position of ruling that, though certain of the challenged rules could conceivably meet the Central Hudson test for constitutionality, no such evidence was placed before the Court by the Defendants. The Defendants' insistence on trying their case under the facial model therefore compels the Court to hold that the challenged rules, as a total package, violate the Plaintiff's First Amendment rights to engage in commercial speech.

B. Plaintiffs' Relief

1. Declaratory Relief

Title 42 U.S.C. § 1983 and the Declaratory Judgment Act, 28 U.S.C. § 2201, authorize entry of declaratory and injunctive relief necessary to bring state agencies or officials into compliance with the Constitution. A declaratory judgment is generally considered a less intrusive form of relief than an injunction, Steffel v. Thompson, 415 U.S. 452, 469 (1974), and "[w]here . . . constitutional violations are found, but state officials have shown their readiness to meet constitutional requirements, the Court should limit its initial response to a grant of declaratory relief." Morrow v. Harwell, 768 F.2d 619, 627 (5th Cir. 1985); Texans Against Censorship, Inc. v. State Bar of Texas, No. 3:94-CV-61, slip op. at 99 (E.D. Tex. Mar. 31, 1995). In Texans Against Censorship, having found that only two of several challenged rules governing lawyer advertising were unconstitutional, the Court wrote, "In the instant action, there is no indication that defendants will fail to recognize and protect plaintiffs' constitutional rights as determined by this court, or that defendants will ignore the adjudication rendered herein. Accordingly, injunctive relief is not necessary and only declaratory relief shall be granted." Texans

Against Censorship, No. 3:94-CV-61, slip op. at 99-100.

Because "injunctive decrees directing state officials are appropriate only when constitutional violations have been shown and when the state officials are demonstrably unlikely to implement the required changes without its [sic] spur," Morrow, 768 F.2d at 627, this Court finds that a declaration that the new Rules are unenforceable should be sufficient to protect Plaintiffs' First Amendment rights. The Court draws support for its conclusion from its review of the Consent Order providing for a moratorium on enforcement of the new Rules with two exceptions, and on the compliance with that order by the Defendants in this case.

2. Attorney's Fees and Costs

Title 42 U.S.C. §1988 provides that, in §1983 actions, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of costs." 42 U.S.C. §1988(b). The Fifth Circuit has ordered an award of attorney's fees in a civil rights suit alleging violations of First Amendment rights. Universal Amusement Co., Inc. v. Vance, 587 F.2d 159, 172-73 (5th Cir. 1978). The Court finds that Plaintiffs, as prevailing parties, are entitled to recover attorney's fees reasonably incurred as a result of this lawsuit. Though the parties have not briefed this issue, and the Court welcomes such briefing by both parties upon submission of fees by Plaintiffs in accordance with Uniform Local Rule 15, the Court believes whatever fees as are awarded should be assessed against the State. See, e.g., Scott v. Flowers, 910 F.2d 201, 213 n.25 (5th Cir. 1990) (holding, in lawsuit against Texas Commission on Judicial Conduct, that award of attorney's fees must be paid by the state and not assessed against defendants in individual capacity, as the "injunctive

relief sought and won . . . can be obtained from the defendants only in their official capacity as commissioners."); Echols v. Parker, 909 F.2d 795, 800 (5th Cir. 1990) (holding State liable for §1988 attorney's fees where county prosecutor, district attorney, and justice court judge were sued in official capacities as enforcing agents of unconstitutional state statute).

V. CONCLUSION

Before the Court in this case were advertising rules which, whatever their design, had the effect of limiting the commercial speech rights of the lawyer Plaintiffs who wished to advertise without the restrictions, of the media and advertising agency Plaintiffs who would have designed, produced and publicized the advertising, and of public citizens who had the right to hear the messages of the advertising lawyers. The Court recognizes that, in different forums, certain of the same rules that are challenged in the present case have been upheld as permissible, narrow restraints on speech, promulgated to protect substantial governmental interests. See Texans Against Censorship, Inc. v. State Bar of Texas, No. 3:94-CV-61, slip op. at 99 (E.D. Tex. Mar. 31, 1995). This Court, however, did not have the benefit of proof offered by Defendants in support of their burden of showing the constitutionality of the new Rules. The Court therefore must strike the new Rules as unconstitutional.

IT IS THEREFORE ADJUDGED AND DECLARED that the Amendments to Rule 7, Information About Legal Services, Mississippi Rules of Professional Conduct, as promulgated by the Supreme Court of Mississippi, (attached hereto as Appendix 1) and made enforceable by the Defendants in this action, are unconstitutional and unenforceable, as applied to Plain

tiffs and others similarly situated, and as the Official Comments to those same Rules indicate the Rules are to be construed and applied.

IT IS FURTHER ORDERED that the Defendants pay all taxable costs and, as a part thereof, all reasonable and necessary attorney's fees and legal expenses as are allowed under 42 U.S.C. §§1983 and 1988, upon compliance by Plaintiffs with Uniform Local Rule 15.

SO ORDERED this the 20th day of June, 1995.

s/s William Barbour, CHIEF JUDGE

psm